

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
KAZ DEVELOPMENT, LLC
Applicant

Kevin Foster
Seth Churchill
Michael Staiano
Glenn Cook
Tom Hudson
Robert Gough, Esquire

For the Application

Stacy P. Silber, Esquire
Attorney for the Applicant

Martin Klauber, Esquire
Peoples Counsel

Neither in Support nor Opposition

McKenney Hills Carroll Knolls Civic Association
By Russell Belcher, MCAD Liaison,
Community Participant in the Hearing

Neither in Support nor Opposition

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

| | |
|------------------------------------|--|
| Applicant: | Kaz Development, LLC |
| LMA No. & Date of Filing: | G-858, filed October 3, 2006 |
| Zoning and Use Sought: | Zone: R-T 12.5 Use: 27 Townhouses (including 4 MPDUs) |
| Current Zone and Use: | Zone: R-60 Current Use: Montgomery College of Art and Design, its parking lot and portions of adjacent rights-of-way to be abandoned by the State and County |
| Location: | Georgia Avenue and Evans Drive in Silver Spring |
| Applicable Master Plan: | <i>Kensington-Wheaton Master Plan</i> |
| Minimum Tract Required: | 20,000 square feet |
| Acreage to be Rezoned: | Approximately 2.53 acres (110,315 sq. ft.) |
| Right-of-Way to be dedicated: | 20-foot wide public improvement easement to connect Douglas Avenue to Lillian Road, and a five-foot wide sidewalk along Georgia Avenue, Evans Drive and Douglas Avenue rights-of-way – the final amounts to be determined at Subdivision |
| Density Permitted in RT-12.5 Zone: | 15.25 DU/acre (per Zoning Ordinance §59-C-1.74, when MPDUs are included) = 38 Dwelling Units (2.53 acres X 15.25 DUs/acre = 38.58 DU maximum). |
| Density Planned: | 10.7 per acre (<i>i.e.</i> , 27 Dwelling Units on 2.53 acres) |
| Bldg. Coverage Allowed/Planned: | 40% Maximum per §59-C-1.74 / 30% planned |
| Green Space Required/Planned: | 45% Minimum per §59-C-1.74 / 50% planned |
| Parking Spaces Required/Planned: | 54 required (2 spaces per unit) / 68 planned |
| Building Height Limits: | 35 feet maximum allowed / 35 feet planned |
| Traffic Issues: | Traffic concerns raised by the neighbors |
| Storm Water Drainage: | Storm water management is a concern of some neighbors. The on-site portion of an existing municipal storm drain system will be moved. Quantity control will be provided by an existing off-site facility. Quality control will be provided on site and in the public right-of-way. Plans will be finalized at Site Plan and Subdivision Review |
| Environmental Issues: | The Site is not in a Special Protection Area. About 1.3 acres on the western portion of the site will be an afforestation area |
| Consistency with Master Plan: | Project is consistent with purpose and objectives of the <i>Kensington-Wheaton Master Plan</i> |
| Neighborhood Response: | Some community concerns, including e-mail and post-hearing letters in opposition and efforts of some neighbors to have the site designated for “Legacy Open Space”; no opposition at the hearing |
| Planning Board Recommends: | Approval |
| Technical Staff Recommends: | Approval |
| Hearing Examiner Recommends: | Approval |

II. STATEMENT OF THE CASE

Application No. G-858, filed on October 3, 2006 by Applicant Kaz Development, LLC, requests reclassification from the R-60 Zone to the R-T 12.5 Zone of 2.53 acres of land located at 10500 Georgia Avenue in Silver Spring, on the site of the Montgomery College of Art and Design. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of twenty-seven new townhomes, including four moderately priced dwelling units (MPDUs). The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 60(d), which contains an illustrative diagram and a specification of the binding elements, as well as other information regarding the development.

Most of the subject property is owned by the Montgomery College Foundation, Inc., which filed a letter indicating that Applicant is the contract purchaser (contingent upon the rezoning), and that the Foundation consents to the rezoning application filed by the Applicant (Exhibit 14). The remainder of the property consists of portions of adjacent rights-of-way to be abandoned by the State and County. The State Highway Administration (SHA) filed a letter dated August 16, 2006, stating its agreement to the inclusion of approximately 500 square feet of its right-of-way in the application (Exhibit 15). The Planning Board recommended approval of Montgomery County's abandonment of its rights-of-way in a letter dated April 19, 2004 (Exhibit 44), and the Council conditionally approved the abandonment on July 3, 2007, in three Resolutions, 16-233, 16-234 and 16-235 (Exhibits 85(a), (b) and (c)). A 20-foot wide public easement will connect Douglas Avenue and Lillian Road.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") who, in a report dated May 4, 2007, recommended approval (Exhibit 38).¹ The Montgomery County Planning Board ("Planning Board") considered the

¹ The Technical Staff Report is quoted and paraphrased frequently herein.

application on May 10, 2007 and, by a vote of 5 to 0, recommended approval, as set forth in a memorandum dated May 18, 2007 (Exhibit 40).² E-mails from a few neighbors expressing various concerns and their preference that the site be made into a park under the “Legacy Open Space” program, rather than rezoned for townhouse development, were received by Technical Staff during its review. Those e-mails were included in the Appendix to the Technical Staff report (Exhibit 38).

A public hearing was convened on May 21, 2007, at which time the Applicant presented evidence and testimony in support of the application. Martin Klauber, the People’s Counsel, did not participate in the hearing, but he did send a note (Exhibit 53) to the Hearing Examiner regarding the issue of “Legacy Open Space,” which will be discussed in Part III. J. of this report, and he reviewed the revisions to the Binding Elements suggested at the hearing (Exhibit 60(c)). Testimony was presented by Russell D. Belcher, representing the McKenney Hills Carroll Knolls Civic Association, which did not take a position either for or against the application. There was no opposition testimony.

The hearing was completed on May 21, 2007, and the record was held open for additional filings by the Applicant (until May 31); for responses thereto by interested parties (until June 11); and for Council action on the then pending proceedings for abandonment of County rights-of-way included in this rezoning application (until June 27). On May 31, 2007, Applicant timely filed a letter addressing a number of issues raised at the hearing (Exhibit 60). Among the attachments to this letter were a revised SDP (Exhibit 60(d)), with modifications agreed to during the hearing, and a matching set of revised covenants (Exhibit 60(e)). There were no objections to the revisions from other parties (Exhibits 60(b) and (c)), but while the record was still open, a number of neighbors filed letters and a petition opposing the development and seeking instead to have a park on the subject site (Exhibits 61-73, 76-77).³

² The Planning Board’s approval recommendation was subject to a proviso that one of the proposed binding elements, regarding donation of the MPDU lots to Habitat for Humanity, be removed from the revised SDP. Applicant agreed to modify its SDP accordingly, and submitted a revised SDP (Exhibit 49) at the hearing. The SDP was subsequently revised again into the version before the Council, Exhibit 60(d).

³ The Hearing Examiner refused to admit unsigned, post-hearing submissions, but the signed letters and petition were allowed.

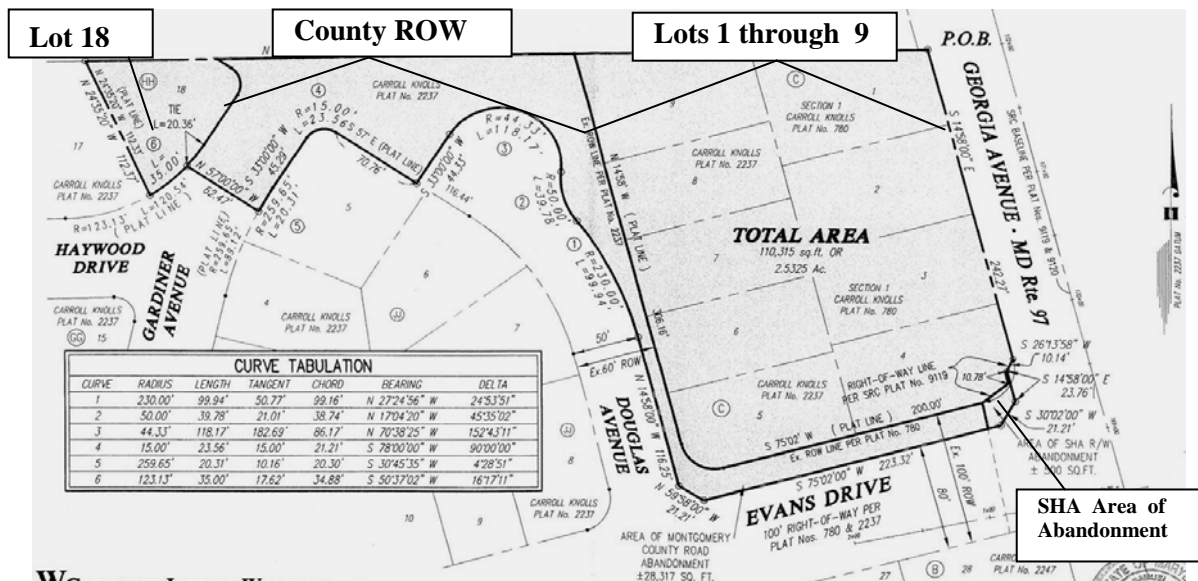
Applicant responded to these post-hearing filings on June 21, 2007 (Exhibit 80).

Since the Council did not have the opportunity to act on the abandonment by June 27, 2007, the closing of the record was postponed at Applicant's request to July 6, 2007 (Ex. 82). Following Council approval of the abandonment mentioned above, the record closed, as scheduled, on July 6, 2007.

III. FINDINGS OF FACT

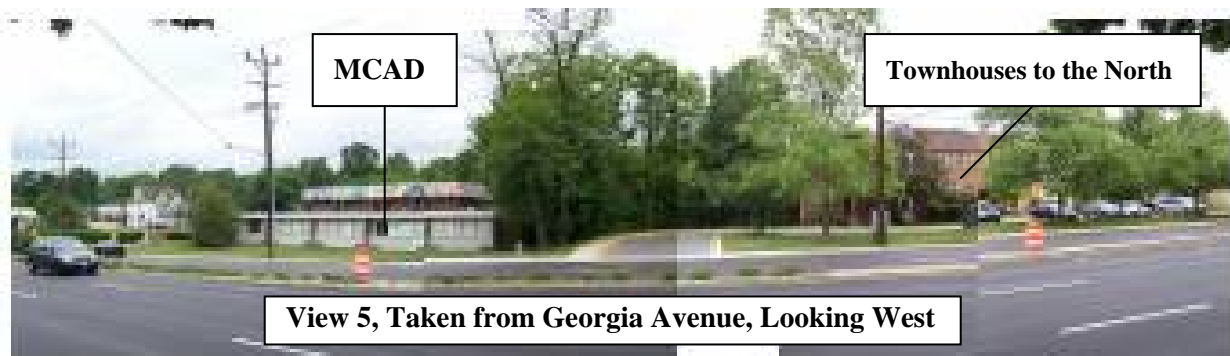
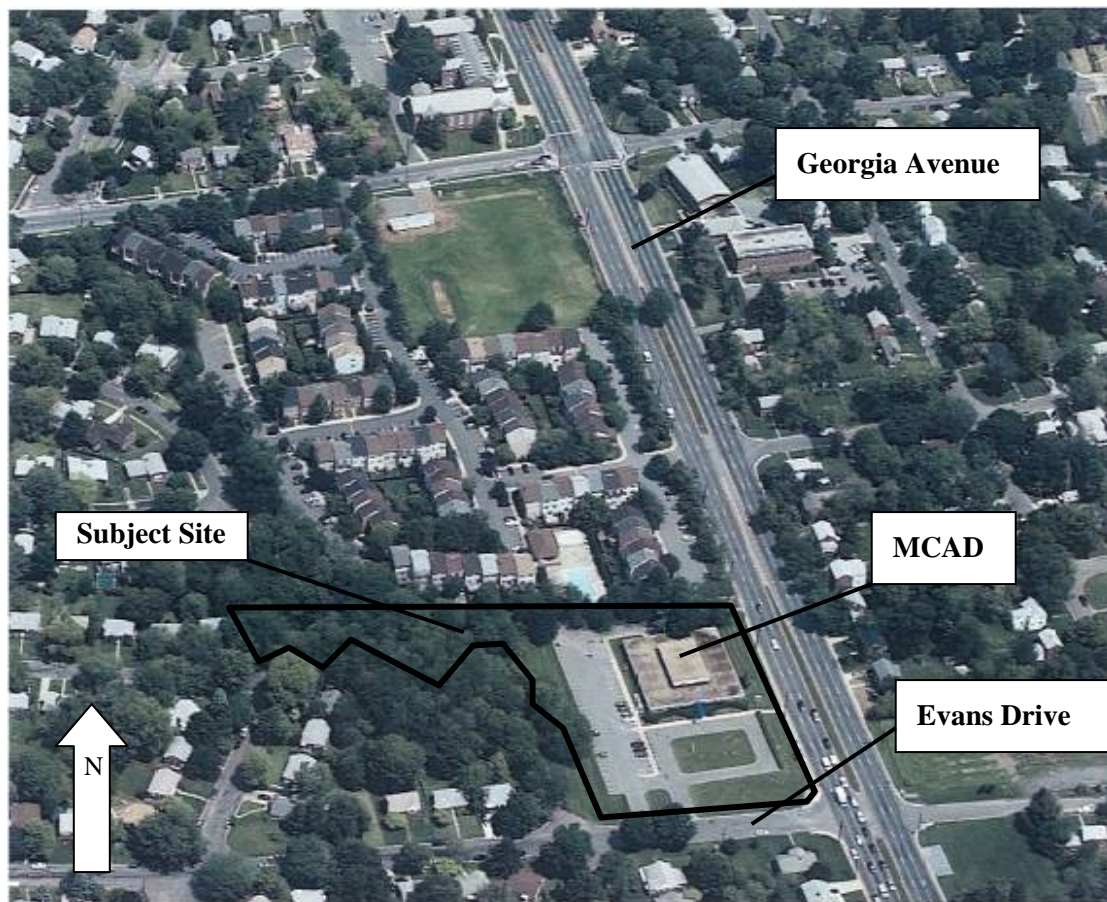
A. Subject Property

The subject property, which has an area of about 110,315 square feet (2.53 acres), is located in the northwest quadrant of Georgia Avenue and Evans Drive, in Silver Spring. It is comprised of Lots 1 - 9 in Block C, Lot 18 in Block H-H, and portions of adjacent rights-of-way to be abandoned by the State and County, all in the Carroll Knolls Subdivision. The total area of the proposed rezoning is shown below on the Plat Map (Exhibit 8):



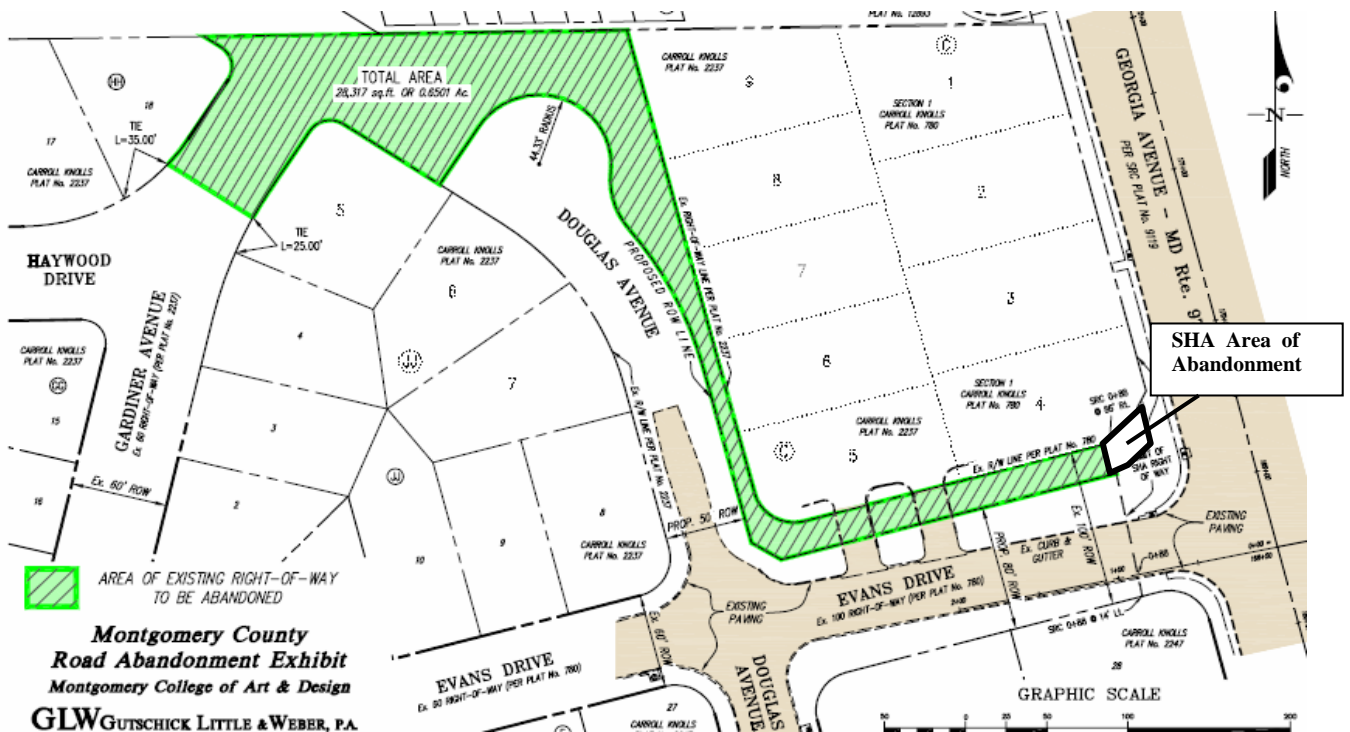
Technical Staff reports that the intersection of Georgia Avenue and Plyer's Mill Road is 900 feet to the north. The Wheaton Metro Station is about 4000 feet to the north, and the Forest Glen Metro Station is about same distance to the south. "The subject property is irregular in shape and fairly flat. The eastern portion [Lots 1 through 9], where the townhouse development is proposed, is roughly rectangular. The western portion [Lot 18 and the County right-of-way], which is forested and

contains wetlands, is highly irregular in shape. A storm drain easement runs diagonally through the property. The property has about 242.27 feet of frontage along Georgian Avenue and 223.32 feet along Evans Drive. The property will also have frontage along Douglas Avenue if Douglas Avenue is extended as proposed in the application. The eastern portion of the property [Lots 1 through 9] contains the Montgomery College of Art and Design [MCAD], which is a one-story institutional building of approximately 13,500 square feet with a [60 car] parking lot, lawn, and some perimeter landscaping.” Exhibit 38, p. 3. The site and its neighborhood are shown below in an aerial photo attached to the Technical Staff report (Exhibit 38), and in a panoramic photo (View 5, Exhibit 47).



View 5, Taken from Georgia Avenue, Looking West

Lots 1 through 9 and Lot 18 are owned by Montgomery College Foundation, Inc. According to Technical Staff, when the Montgomery County rights-of-ways (about 28,317 square feet) are abandoned, they will revert back to Montgomery College Foundation, Inc. Exhibit 38, p. 2. When the State Highway right-of-way (about 500 square feet) is abandoned, it will be offered for sale to the Applicant, Kaz Development, LLC, as the contract purchaser of Lots 1-9 and Lot 18. See Letter from SHA (Exhibit 33(n)). The County rights-of-way to be abandoned are shown below as a hatched area on Exhibit 46. The SHA abandonment area has been denoted by the Hearing Examiner on the Exhibit.



Currently, vehicular access to the subject property is via Evans Drive, a primary residential road with a 100-foot right-of-way. Evans Drive connects to Georgia Avenue (MD 97), which is a major highway with a 120-foot right-of way and six travel lanes. The intersection of Georgia Avenue and Evans drive is not signalized, but in the part of Georgia Avenue adjacent to the subject property, there is a median. There is pedestrian access to the site from a “lead walk,” off of the sidewalk that runs along the Georgia Avenue frontage. The Georgia Avenue sidewalk immediately abuts the street,

and no tree panels separate it from the roadway. There is also a footpath that runs through the western undeveloped portion of the property. Exhibit 38, p. 3.

B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. Technical Staff recommends adopting the surrounding area definition used by Kevin Foster, Applicant’s land use planner, as set forth in his Land Use and Zoning Report (Exhibit 33(c), p.4) and Tr. 63-65. It is the area encompassed by Plyers Mill Road to the north, Hutting Place and Haywood Drive to the west, Dennis Avenue to the south, and, to the east, the rear property lines of properties east of Georgia Avenue, between Dennis Avenue and Plyers Mill Road. The Hearing Examiner accepts this unchallenged definition of the surrounding area, and it is shown below in

Exhibit 51:



Technical Staff describes the surrounding area as follows (Exhibit 38, p. 4.):

The defined surrounding area is mainly developed with single-family homes on land zoned R-60, plus townhomes to the north of the subject property on land zoned R-T 15 and R-T 12.5. The single-family homes to the west of Georgia Avenue are located within the Plyers Mill Estates subdivision and the Carroll Knolls subdivision. The single-family homes within the surrounding area to the east of Georgia Avenue are within the Glenview and Evans Parkway subdivisions. The townhouse development right at the corner of Plyers Mill Road and Georgia Avenue is zoned R-T 15 and has 30 lots on 81,467 s.f (1.87 acres) of land, for an approximate density of about 16 units per acre. The older townhouse development that surrounds the corner townhouse development to the south and west has 93 lots on 328,599 s.f (7.54 acres), for an approximate density of 12 units per acre. Both of these townhouse developments were once on land zoned R-60, and were rezoned pursuant to Zoning Applications G-786 (adopted 3/27/2001) for the northernmost development, and F-951 (adopted 9/21/76) for the southernmost, older development.

Also within the surrounding area is a church in the southeast quadrant of Georgia Avenue and Plyers Mill Road on land zoned R-60. Directly opposite the subject property to the east, across Georgia Avenue, is the Evans Parkway Neighborhood Park, which was recently expanded to include the parcel at the corner of Georgia and Evans Parkway.⁴

Some of the features surrounding the subject site are shown below in photos from Exhibit 47:



⁴ Montgomery College Foundation, Inc., also owns three vacant lots west of Douglas Avenue, across from the subject site. They are not part of the application, but will eventually be developed as single-family houses, according to Technical Staff. Exhibit 38, p. 8.

C. Zoning History

The subject property was classified under the R-60 Zone in the 1958 Countywide Comprehensive Zoning. The R-60 Zone was reconfirmed by Sectional Map Amendments (SMA) G-136 and 137 (10/24/78); SMA G-744 (6/24/97); SMA G-761 (7/14/98); and SMA G-795 (4/16/02). The site was granted a special exception, S-493, on August 4, 1976, to run a private educational institution (MCAD). The Board of Appeals revoked the special exception in 2004, because Montgomery College, which acquired the property, is a public entity and does not need a special exception to operate a school in the R-60 Zone. Exhibit 38, pp. 3 and 8.

D. Proposed Development

The Applicant proposes to construct twenty-seven, rear garage, three-story townhouse units, including four MPDUs, for a density of 10.7 dwelling units per acre. Technically, Zoning Ordinance §59-C-1.74 permits a density of up to 15.25 dwelling units per acre in the R-T 12.5 Zone, when MPDUs are included on site. In this case, that would permit Applicant to construct up to 38 dwelling units (2.53 acres X 15.25 DUs/acre = 38.58 DU maximum). However, Applicant's land planner, Kevin Foster, explained in his Land Use and Zoning Report (Exhibit 33(c), p. 5) that such a density cannot be achieved on this site "given the requirements of stormwater management, forest conservation, green space, and an appropriate unit lay-out compatible with the surrounding area."

All of the townhouse units will be located on the eastern (rectangular) portion of the site; the western portion of the property, containing the wetlands, will be reforested. An existing storm drain system will have to be relocated to permit the development. In doing so, its capacity will be increased, "which should have a positive benefit on . . . [the] upstream neighbors," according to Applicant's civil engineer, Seth Chruchill. Exhibit 60(f).

An overview of the project can be seen in the illustrative diagram (Exhibit 50), set forth on the following page. In it, the proposed development is superimposed over an aerial photo of the site.



E. Schematic Development Plan and Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the required Declaration of Covenants in the record of this case as Exhibit 60(e).

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to

specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment. The graphic portion of the revised SDP (Exhibit 60(d)), which is illustrative, is reproduced below.



The plan shows six rows of townhouses. Rows of four units and six units face Georgia Avenue and have front yards of at least 25 feet to allow for a green corridor and pedestrian enlivenment along the street, according to Technical Staff. A row of five units faces Evans Drive. Three rows (of three units, four units, and five units) are clustered around a rectangular homeowner association open space off Douglas Avenue. The open space is meant to function as a “village

green” and hence is located away from Georgia Avenue and its noise and fumes. The MPDUs are located in the row of four units facing Douglas Avenue and the rectangular open space. These features can be more easily seen on an enlarged reproduction of the eastern portion of the SDP:



The illustrative Schematic Development Plan shows that the market-rate units will have two-car garages, and the 4 MPDUs will each have one-car garages, plus two parking spaces available in their driveways. A pedestrian circulation system is provided, including a walkway through the development connecting Douglas Avenue to Georgia Avenue, and sidewalks along Georgia Avenue, Evans Drive and Douglas Avenue. The plan, as shown in the illustrative diagram on page 12 of this

report, is to have tree panels separating the sidewalks from the streets. The existing sidewalk on Georgia Avenue has no tree panel, and Applicant will be dedicating a strip approximately six feet, seven inches wide along Georgia Avenue to provide additional room for the streetscaping. Exhibit 60, p. 3. Other pedestrian facilities are included among the nine binding elements embossed on the SDP (Exhibit 60(d)) and set forth below:

Binding Elements - IN ADDITION TO THOSE SHOWN IN THE ZONING STANDARDS TABLE:

1. TOWNHOUSE UNITS THAT FACE ON A PUBLIC RIGHT-OF-WAY SHALL HAVE BRICK FRONTS, AND THE END UNITS OF EACH ROW OF TOWNHOUSES THAT FACE ON A PUBLIC RIGHT-OF-WAY SHALL HAVE BRICK SIDES AS WELL.
2. ALL STREET TREES INSTALLED WITHIN THE PUBLIC RIGHT-OF-WAY AROUND THE PERIMETER OF THE SITE SHALL BE A MINIMUM OF 3-1/2" CAL. AT INSTALLATION.
3. LANDSCAPE BUFFER AND OR FENCING SHALL BE INSTALLED ALONG THE NORTHERN PROPERTY LINE BETWEEN GEORGIA AVENUE AND DOUGLAS AVENUE. FINAL DESIGN SHALL BE DETERMINED AT THE TIME OF SITE PLAN
4. CONSTRUCT A PEDESTRIAN CONNECTION FROM THE END OF DOUGLAS AVENUE TO THE COMMUNITY TO THE NORTH WITH THE WIDTH AND LOCATION TO BE DETERMINED AT SITE PLAN.
5. AT THE TIME OF RECORD PLAT, DEDICATE OR PROVIDE A 20' PUBLIC USE EASEMENT FROM END OF DOUGLAS AVENUE TO NORTHERN PROPERTY LINE.
6. USE - TOWNHOUSE
7. PROVIDE A PEDESTRIAN CROSSWALK ACROSS GEORGIA AVENUE AT EVANS DRIVE, SUBJECT TO DFW&T AND SHA APPROVAL (IF DFW&T AND SHA DO NOT APPROVE THE CROSSWALK, THEN NO CROSSWALK IS REQUIRED). THIS CROSSING WILL INCLUDE A PEDESTRIAN REFUGE ISLAND IN THE MEDIAN, ALONG WITH THE APPROPRIATE CURB DEPRESSIONS AND RAMPS TO COMPLY WITH ADA REQUIREMENTS FOR THE CROSSING. SUBJECT TO DFW&T AND SHA APPROVAL.
8. IN ACCORDANCE WITH 'STAFF GUIDELINES FOR THE CONSIDERATION OF TRANSPORTATION NOISE IMPACTS IN LAND USE PLANNING AND DEVELOPMENT', BUILDING ENVELOPES WILL BE DESIGNED TO ALLOW THE AVERAGE INTERIOR DNL TO BE REDUCED TO 45 dBA[Ldn] OR LOWER, AND PROJECTED EXTERIOR DNL FOR UNIT REAR DECK OR PATIO SPACES WILL BE 65 dBA[Ldn] OR BELOW.
9. APPLICANT WILL ALLOW PUBLIC ACCESS TO THE FOREST CONSERVATION EASEMENT AREA TO THE EXTENT ALLOWED BY THE MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION STAFF, WITH SUCH ACCESS BEING DETERMINED AT SITE PLAN.

These binding elements address concerns raised by Technical Staff and the community, as well as those issues raised at the hearing. One binding element that Applicant had initially proposed, promising donation of the MPDU lots to "Habitat for Humanity or other affordable housing builder," if the Planning Board approved a plan for the MPDUs to be arranged in a single row, was rejected by

the Planning Board (Exhibit 40), and therefore does not appear in the current proposal. Tr. 14-15.

Technical Staff noted that Habitat for Humanity had agreed to build the donated MPDUs to “green building” standards, which would be in the public interest (*See* May 2, 2007 letter from Habitat for Humanity in the Appendix to Exhibit 38). According to its memorandum of May 18, 2007 (Exhibit 40, p. 2), the Planning Board rejected this binding element because it felt that the property might be transferred after rezoning, and the designated affordable builder might not be able to afford completion of all the MPDUs required by law. Moreover, the Planning Board felt that the aggregation or dispersal of the MPDUs should be determined at site plan.

Applicant’s representative, Thomas Hudson, explained at the hearing that, for Applicant to donate the MPDU lots and thus have the MPDUs constructed by a builder other than the one building the market rate units, the MPDUs must be arranged as a single stick, as shown on the revised SDP (Exhibit 60(d)). Having two builders working on the same stick of townhouses would be inefficient and very complicated. Tr. 193-195. M-NCPPC’s Housing Coordinator, Sharon Suarez, observed in a memorandum attached to the Technical Staff report (Exhibit 38) that “[g]arage townhomes are actually considered so desirable that they are exempted from the concerns of site aggregation in the MPDU site plan guidelines for projects,” citing to a Montgomery County Planning Board 1995 guideline. Ms. Suarez added (at the bottom of that same memo), “Generally, the guidelines indicate that a certain amount of aggregation of MPDUs is considered appropriate in order to provide builders with necessary economies of scale.” Tr. 201-202.

Russell Belcher, testifying on behalf of the McKenney Hills Carroll Knolls Civic Association, also endorsed the participation of Habitat for Humanity in building the MPDUs, especially because of its experience in building green structures. Tr. 213-214. Thus, the idea of having four MPDUs, each with a garage, arranged in a single row, and constructed to green building standards by Habitat for Humanity (or other affordable-housing builder) is strongly supported in the record. It may well reflect

the manner in which the required MPDUs will be included in this project, but that will be decided at site plan by the Planning Board, and not by a binding element in the SDP.

In addition to the binding elements set forth above, Applicant specified in the SDP that it will be bound by a limit of 27 townhouse units, with a minimum of 12.5% MPDUs and a density not to exceed 10.7 DU/Acre. This binding limitation is found in the Development Standards also printed on the SDP, and reproduced below.

DEVELOPMENT STANDARDS RT-12.5 - Optional Method (MPDU)

| | REQUIRED | PROPOSED | BINDING |
|---|------------------------------|------------------------------------|---|
| Minimum Tract Area | 20,000 sf (0.46 Ac.) | 2.53 Acres | - |
| Maximum Density (with MPDU's) | 15.25 D.U. / Ac. 38 Units | 10.7 D.U. / Ac. 27 Units | Up To 10.7 D.U. / Ac. Up To 27 Units |
| Moderately Priced Dwelling Units (MPDU): (12.5% of total units) | 12.5% of total | 12.5% of total | 12.5% of total |
| Building Setbacks: | | | |
| - From any detached dwelling lot or land classified in a single- family detached residential zone | 30 feet | 30 feet minimum | - |
| - From any public right-of-way | 25 feet | 25 feet minimum | - |
| - Side (from an adjoining lot) | 10 feet | 10 feet minimum | - |
| - Rear (from an adjoining lot) | 20 feet | 20 feet minimum | - |
| - From an adjoining lot: | | | |
| - Side (end unit) *Lot 4 | 10 feet | 60 feet minimum | - |
| - Side (end unit) *Lot 27 | 10 feet | 60 feet minimum | - |
| - Rear *Lot 1 | 20 feet | 45 feet minimum | - |
| - Rear *Lot 2 | 20 feet | 40 feet minimum | - |
| - Rear *Lot 3 | 20 feet | 40 feet minimum | - |
| Maximum Building Height | 35 feet | 35 feet | - |
| Maximum Lot Coverage | 40% | 30.0% | - |
| Minimum Green Area | 45% (1.14 Acres) | 50.0% (1.27 Acres) | - |
| Off-street Parking | 2.0 spaces / D.U. | 2.0 spaces / D.U. + Visitor Sp. | - |

*NOTE: Applicant will comply with all applicable zoning requirements

Parking Provided:

| | |
|---|-----------|
| 23 Market Units w/ 2 car garages = | 46 Spaces |
| 4 MPDU's w/ 1 car garages + 2 in driveway = | 12 Spaces |
| Additional off-street parking proposed | 10 Spaces |
| Total off-street parking proposed | 68 Spaces |
| Total on-street parking proposed (Douglas Avenue) | 6 Spaces |

Other information about the development is shown in text boxes on the SDP labeled "Site Data" and "Notes."

SITE DATA

| | |
|--------------------|--|
| Existing Zoning: | R-60 |
| Proposed Zoning: | RT-12.5 |
| Road Dedication: | 0.04 Acres (Georgia Avenue) |
| Gross Tract Area: | |
| Lot 1, Block C | 9,286 sf |
| Lot 2, Block C | 8,750 sf |
| Pt. Lot 3, Block C | 8,750 sf |
| Pt. Lot 4, Block C | 8,473 sf |
| Lot 5, Block C | 7,991 sf |
| Lot 6, Block C | 7,500 sf |
| Lot 7, Block C | 7,500 sf |
| Lot 8, Block C | 7,500 sf |
| Lot 9, Block C | 8,816 sf |
| Lot 18, Block HH | 6,938 sf |
| Road Abandonment | 28,811 sf (Douglas Avenue & Evans Drive) |
| Total Tract Area | 110,315 sf = 2.53 Acres |

NOTES

1. OWNER: MONTGOMERY COLLEGE FOUNDATION INC.
10500 GEORGIA AVENUE
SILVER SPRING, MARYLAND 20902
2. DEVELOPER: KAZ DEVELOPMENT LLC
2139 BLUE KNOB TERRACE
SILVER SPRING, MARYLAND 20910
ATTN: VICTOR KAZANJIAN
PHONE: 301-438-2211
3. BOUNDARY SURVEY BY: GUTSCHICK, LITTLE, & WEBER, P.A. - 2006
4. FIELD SURVEYED TOPOGRAPHY BY: GUTSCHICK, LITTLE, & WEBER, P.A. - JAN. 2006.
5. THE SITE AREA IS LOCATED IN THE SLIGO CREEK WATERSHED. THIS AREA IS NOT A SPECIAL PROTECTION AREA. THIS WATERSHED IS DESIGNATED BY THE STATE AS A WATER USE CLASS I: WATER CONTACT RECREATION & PROTECTION OF AQUATIC LIFE.
6. PROPOSED WATER AND SEWER SERVICE WILL BE PUBLIC. THE EXISTING WATER & SEWER CATEGORIES: W-3, S-3.
7. NRI/FSD BY: GUTSCHICK, LITTLE, & WEBER, P.A. #4-06248
APPROVED ON JUNE 22, 2006.
8. WETLAND DELINEATION BY: MCCARTHY & ASSOCIATES
NOVEMBER, 2005.
9. DEVELOPMENT PROGRAM: THIS PLAN WILL BE DEVELOPED IN ONE PHASE.
10. ALL UTILITIES ARE CONCEPTUAL AND SUBJECT TO CHANGE.
SEE APPROPRIATE APPROVED UTILITY DRAWINGS.
11. THIS DEVELOPMENT WILL PRODUCE LESS THAN 30 PEAK HOUR TRIPS, AND THEREFORE A TRAFFIC STUDY IS NOT REQUIRED.
12. THERE ARE NO KNOWN HISTORIC SITES ON THIS PROPERTY.
13. THERE ARE NO KNOWN RARE, THREATENED OR ENDANGERED SPECIES OCCURRING ON THIS PROPERTY.
14. STORM WATER QUALITY TO BE PROVIDED ON-SITE. STORM WATER QUALITY TO BE PROVIDED OFF-SITE. SWM CONCEPT PLAN NO. 226302, APPROVED 8-10-06
15. THERE IS NO 100 YEAR FLOODPLAIN ON THIS SITE.

A total of 68 off-street parking spaces are shown on the illustrative Schematic Development Plan. The 23 market-rate units will provide 46 spaces in their two-car garages; the 4 MPDUs will provide 12 spaces in their one-car garages and two-car driveways; and there will be 10 additional off-street spaces for visitors.

On the northern edge of the site, Applicant proposes to construct a cul-de-sac as the termination of Douglas Avenue. Binding elements #4 and #5 promise a 20-foot wide, public use easement and construction of a pedestrian connection from the end of Douglas Avenue to the community on the north, with the width and location of the pedestrian path to be determined at site plan.

The Planning Board has also approved a Preliminary Forest Conservation Plan to protect the wetland and tree area in the northwest corner of the site. Exhibit 40, p. 2. Applicant anticipates cleaning up the invasive species that are in there today, reforesting, and trying to maintain and increase the quality of that open space for wildlife habitat and for viewing. Tr. 56-57. Applicant agreed to a new Binding Element #9, making the forest conservation area available to the public (not just residents of the subject site), to the extent permitted by environmental controls to be determined at site plan. Tr. 61.

There will be two vehicular access points to the site, both from Douglas Avenue. Unlike the existing situation, there will be no access to the proposed development along Evans Drive. Applicant's transportation planner, Glenn Cook, testified that the current access points to the site along Evans Drive are both close to Georgia Avenue, which is not as safe as the planned Douglas Avenue access. Tr. 169-170. In his opinion, access and circulation within the proposed development would be adequate, safe and efficient. The two groups of townhouses that will front on Georgia Avenue would be accessed via a rear alley that connects to the Douglas Avenue cul-de-sac. There will be a group of townhouses that will front on Evans Drive, to create a residential street front along that roadway. Along Douglas

Avenue, the three groups of townhouses surrounding a public open space will be served by the proposed internal circulation. There will be enhanced streetscaping along Georgia Avenue, Douglas Avenue and Evans Drive (*See Binding Element #2*), and there will also be a landscape buffer and/or fence along the northern property line between the subject property and the Plyers Mill Crossing Townhouses to the north (*See Binding Element #3*). Tr. 52.

F. Development Standards for the Zone and Noise Issues

Development Standards:

Special regulations for the R-T 12.5 Zone are spelled out in Zoning Ordinance §59-C-1.72, beginning with the stated “Intent and Purpose” of the Zone in §59-C-1.721. The issue of whether the subject application comports with the intent and purpose of the R-T 12.5 Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

Although one stated intent of the R-T Zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping,” the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. The maximum number of townhouses in a group is eight; and three continuous, attached townhouses is the maximum number permitted with the same front building line. Variations in the building line must be at least 2 feet.

Applicant’s illustrative SDP shows that these requirements have been met. The proposed development is comprised of six “sticks” of townhouses, none of them exceeding eight units. All the groups show the required two-foot variation in their front building lines.

Zoning Ordinance §59-C-1.723 is inapplicable because Applicant has not sought to combine R-T-zoned tracts with different residential zones; rather, Applicant seeks to have the entire subject site reclassified into the R-T 12.5 Zone. The Development Standards for the R-T 12.5 Zone are spelled out in Zoning Ordinance §59-1.73 for developments without MPDUs and in §59-1.74 for developments with MPDUs. As shown in the table below, abbreviated from the Technical Staff report

(Exhibit 38, pp. 12-15), the proposed development would meet or exceed the applicable development standards for the R-T 12.5 Zone.

| R-T 12.5 Zone | Required | Proposed | Compliance |
|--|-------------------------------------|----------------------------------|-------------------|
| 59-C-1.731. Tract Area and Density. (a) Minimum tract area (square feet). | 20,000 | 110,315 | Yes |
| 59-C-1.732. Building Setbacks (Min, in Feet) | | | |
| (a) From any detached dwelling lot or land classified in a one-family, detached, residential zone. | 30 ¹ | 30 | Yes |
| (b) From any public street. | 25 | 25 | Yes |
| (c) From an adjoining lot; | | | |
| (1) Side (end unit) ² | 10 | 60 (Lots 4 & 27) | Yes |
| (2) Rear. | 20 | 45 (Lot 1); 40 (Lots 2 and 3) | Yes |
| 59-C-1.733. Maximum Bldg Height (in Feet) (a) For a main building. | 35 | 35 | Yes |
| 59-C-1.735. Parking. Off-street parking in accordance with Article 59-E,. | 2 parking spaces for each townhouse | 68 | Yes |
| 59-C-1.74. Development including moderately priced dwelling units. | | | |
| (b) Maximum density of development (dwelling units) per acre of usable area | 15.25 | 10.7 | Yes |
| (c) Maximum Building Coverage (%) | 40 | 30 | Yes |
| (d) If necessary to accommodate increased density: (1) Minimum Green Area (%) | 45 | 50 | Yes |

1 Unless a more desirable form of development can be demonstrated by the applicant to the satisfaction of the planning board using the street, side and rear lot line setbacks as provided in this section.

2 Where the side lot of an end unit abuts a public street, the side yard setback must equal the required front yard setback.

Noise Issues:

One issue not discussed in the Technical Staff report is the potential impact of traffic noise from Georgia Avenue upon the proposed development. Applicant's acoustical engineer, Michael Staiano, testified (Tr. 141-160) that the requirement for outdoor noise in activity areas is that the day/night average sound level (also known as " L_{dn} ,") not exceed 65 decibels. For the indoor areas of the dwellings, the day/night average sound level may not exceed 45 decibels. In his opinion, the proposed project, as depicted on the schematic development plan, "can" satisfy those guidelines. Tr. 144-146. Mr. Staiano's study reflected that outdoor deck areas for three of the units would exceed maximum permitted sound levels. These will be dealt with by either not including deck areas for those units or by enclosing them.

Because Mr. Staiano's report did not address the indoor sound levels, the Hearing Examiner questioned him further on how he reached his conclusion. Mr. Staiano explained that the actual calculations of indoor noise will be done later, but that with appropriate building materials and design, the required acoustical levels can be reached indoors. The Hearing Examiner therefore asked for a binding element assuring that the buildings will be designed to meet the required acoustical levels, both outdoor and indoor. Applicant's attorney agreed to this request (Tr. 148), and new Binding Element #8 reflects this commitment. The proposed development may help to shield residences west of the subject site from some of the Georgia Avenue road noise, but Mr. Staiano has not done that analysis yet.

Although the potential of excessive traffic noise from Georgia Avenue will have to be examined closely at site plan review, it appears from Mr. Staiano's testimony that appropriate sound mitigation measures can be taken to insure that noise from the highway does not exceed County standards. Moreover, residential developments exist on both sides of Georgia Avenue, just as close to road as the proposed development, so apparently the highway noise can be sufficiently buffered.

In fact, the current R-60 Zone of the subject site would obviously permit residential (*i.e.*, single-family detached) development on this site without rezoning or special exception. Based on the unrebutted evidence that traffic noise levels can be sufficiently ameliorated to meet County standards, and Applicant's binding element committing it to take the steps necessary to meet these standards, the Hearing Examiner finds that the potential for highway noise should not preclude rezoning the subject site for townhouse use.

G. Master Plan

The MCAD site is located in the area subject to the *Master Plan for the Communities of Kensington-Wheaton* (May 1989, as amended April 1990). The Master Plan makes no site-specific recommendation for the site, other than to show it as "quasi public" on its Land Use Plan. Applicant's land use planner, Kevin Foster, testified that the Master Plan shows the site as a quasi-public use because MCAD was located on it. The Master Plan, in general, recommends low-to-medium density residential use for the area around the subject site. In Mr. Foster's opinion, Applicant's proposal is in general conformance with the goals and objectives of the Master Plan, and it will be compatible with the existing surrounding uses and the purpose clause of the R-T Zone. Tr. 68-83. He noted that specific compliance with recommendations of the Master Plan is not a requirement for reclassification into the R-T Zone.

On page 28 of the Master Plan, the goals and objectives include protecting and stabilizing the extent, location and character of existing residential and commercial land uses. The objective is to maintain the well-established, low and medium density residential character, which prevails over most of the planning area, and preserve the identity of residential areas along major highway corridors, to soften the impact of major highways on adjacent homes. According to Mr. Foster, Applicant's proposal will do so. It will also provide a buffer and transition from east to west for the Carroll Knolls Subdivision, creating a buffer from the activity and noise along Georgia Avenue for the houses

further west in the Carroll Knolls Subdivision. It will also provide additional transition between the R-60 developments of the Carroll Knolls Subdivision and higher density developments to the north.

Some of the key land use indicators are referred to on page 18 of the Master Plan. Existing land use is predominantly low-density, single family residential, except for major intersections along the corridor. Mr. Foster opined that the proposed townhouse development of approximately 10.7 dwelling units per acre will be consistent with existing development character and established fabric of the community. The Master Plan recommends that residential areas along major highways should be reinforced and protected by a land use and landscaping approach called “green corridors.” The proposed development will reinforce the residential, architectural edge along Georgia Avenue, provide green streetscaping, soften the impacts of the highway and create a higher quality pedestrian network. It will be replacing the existing institutional use with a residential use to fortify this residential edge, and will be doing the same along Evans Drive.

In the transportation and mobility plan (Chapter 5), the Master Plan seeks to promote non-motorized mobility by providing a sidewalk and trail network to serve pedestrians and bikers. The proposed development will provide multi-use (pedestrian and bike) linkage between Douglas Avenue and Lillian Drive to the north. The trail connections will also allow visual access to the natural wetland area preserved on the site. Interior sidewalk connections will be provided from Douglas Avenue, east-west to Georgia Avenue, for pedestrian interconnectivity and access to the bus transportation along Georgia Avenue. New sidewalks will be provided along Georgia Avenue as part of the enhanced streetscape. Applicant is also proposing striped crosswalks across both Georgia Avenue and Evans Drive, with a pedestrian refuge in the Georgia Avenue median island to facilitate safer crossing for pedestrians. Applicant agreed to make this a new binding element (#7), subject to the approval of SHA and the Montgomery County Department of Public Works and Transportation (DPW&T). Tr. 73-75.

The Master Plan (page 36) seeks to protect water quality of the streams, and to prevent erosion and flood damage in the Kensington/Wheaton area. It also seeks to promote the conservation of selected areas in their natural undeveloped state, with active recreation uses in some instances. Again, Applicant is proposing to protect this environmentally sensitive area and to create recreational opportunities, within the bounds of protecting that environmental area. Chapter Six of the Master Plan encourages the acquisition and maintenance of natural area, open spaces and recreational facilities. Directly across Georgia Avenue from the subject property is the recently expanded Evans Parkway local park. Applicant's proposal to stripe the crosswalk across Georgia Avenue and to add a median refuge for pedestrians will provide better access from the subject property to the Evans Parkway Park. Moreover, as part of the proposed abandonment and the schematic development plan, a contiguous open space will be created to protect the environment and provide recreational opportunities for the community, consistent with the Master Plan's goals.

Technical Staff indicated that it was persuaded "by the very thorough analysis of master plan compliance provided by the Land Use and Zoning Report prepared by the applicant's land use consultant." Exhibit 38, p. 16. Community-Based Planning (CBP) Staff also analyzed this matter in a memorandum dated May 2, 2007, a copy of which is attached to the Technical Staff report. In that analysis, CBP Staff observed that the Master Plan recognized nearby property, with characteristics similar to the subject site, as appropriate for the R-T Zone, "as a way of extending the townhouse development which surrounds it . . ." Master Plan, p. 59. That nearby property is located at the intersection of Georgia Avenue and Plyers Mill Road, just north of the subject site, and this rationale thus applies with equal force to land use on the subject site.

As stated by CBP Staff,

the college's property can be seen as an extension of the townhouse community now located south of the [Plyers Mill] intersection. It would be contiguous to that community and would create the appearance of a single neighborhood of townhouses between Evans Drive to the south and Plyers Mill Road to the north. To the south of

the college's property, there are multi-family apartment communities along Georgia Avenue. The relative proximity of this area to Metro's Forest Glen Station contributes to the suitability of increased densities in this area.

CBP Staff, in concluding that this rezoning application is consistent with the Master Plan and should be granted, pointed out that:

The return of the college property to residential uses conforms to the Plan's objective of redevelopment that stabilizes and maintains the residential character of this portion of Georgia Avenue. It will also help to preserve the existing generally residential identity of the area.

Technical Staff (*i.e.*, the Zoning Staff) concurred with CBP Staff's conclusions (Exhibit 38, pp. 15-16), as does the Hearing Examiner. Applicant's proposed development on the subject property will provide the medium density residential housing that is compatible with existing townhouses and single-family residences and consistent with the goals of the *Master Plan for the Communities of Kensington-Wheaton*.

H. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and other services will be adequate to support a proposed development, and in turn, whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process.

The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council in the Annual Growth Policy ("AGP") and biennially in the two-year AGP Policy Element. While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case because the Council has the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of

the discretionary nature of the Council's review and the fact that the scope of Council's review is much broader at the zoning stage than that which is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of public facilities.

1. Transportation

The principal tool used by the County to evaluate the ability of transportation facilities to handle a proposed development is the Local Area Transportation Review ("LATR"). LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. As of July 1, 2004, an LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips. Applicant employed Glenn Cook, an expert in transportation planning, to evaluate the impact of the proposed development on area roadways.

Mr. Cook testified (Tr. 161-184) that he prepared a letter report dated April 9, 2007 (Exhibit 33(j)) which looked at the existing use on the subject property and compared it to the proposed use. The existing property contains the Montgomery County Art and Design College (MCAD). Using enrollment figures, Mr. Cook made projections as to how many cars could be generated by the existing site based on the existing enrollment figures, and he compared that to what was projected to be generated by 27 townhouse units. He concluded that the 27 townhouses would generate significantly less traffic than what the college was projected to generate. However, because of concerns raised by the community, Mr. Cook subsequently did an actual traffic count at MCAD, and determined that, using either methodology, the proposed 27 townhouses would generate less traffic than what is currently being generated by the MCAD property.

Mr. Cook reported these findings in a revised traffic study (Exhibit 54(a)). During the morning peak-hour period, he observed 45 vehicles entering or leaving the college through one or both of the driveways. During the evening peak-hour he observed 25 vehicles doing the same thing. Based on the

trip generation calculations which Park and Planning requires for a townhouse unit, the proposed plan would only generate 13 trips during the morning peak hour and 22 trips during the evening peak hour. The trip generation calculations are based on averages, but they are very conservative. Mr. Cook therefore concluded that, regardless of the method used, the townhouse development would actually reduce traffic at the site and would not exceed the 30 trip threshold which triggers the need for a full traffic study.

Mr. Cook further observed that the current access points to the site along Evans Drive are close to Georgia Avenue, while under the proposed plan, access to the 27 townhouse units is proposed along Douglas Avenue, which creates a much safer means of ingress and egress to the property because the two proposed access points would be much further from Georgia Avenue. There will be no access to the proposed development along Evans Drive. Mr. Cook opined that access and circulation within the proposed development are adequate, safe and efficient.

Transportation Planning Staff, in a memorandum dated May 1, 2007, agreed that an LATR traffic study was not needed in this case and that the transportation network was “adequately provided for.” Appendix to Exhibit 38. Transportation Planning Staff therefore recommended approval of the proposed rezoning. They also recommended that the development be limited to 27 townhouses; that Applicant dedicate 60 feet of right-of-way from the centerline of Georgia Avenue; and that Applicant construct an 8-foot wide shared-use path within a 20-foot wide public improvement easement to connect Douglas Avenue to Lillian Road. Applicant has included the first and third of these items in binding elements, and has agreed to road dedication along Georgia Avenue as determined at Subdivision. Ex. 60.

Based on this record, the Hearing Examiner finds that transportation facilities are adequate and will not be adversely affected by the proposed development.⁵

⁵ The Hearing Examiner also questioned Mr. Cook about the possibility of signaling the Georgia Avenue/Evans Drive intersection. His response is discussed in Part III. J. 3 of this report in connection with community concerns.

2. Utilities

Technical Staff stated in its report that the subject site is served by public water and sewer systems. Exhibit 38, p. 9. Applicant's civil engineer, Seth Churchill, testified that the WSSC assured him that its capacity more than meets the demand which will be generated by the development. Tr. 136-138. Although WSSC has noted that the planned relocation of the storm drain will complicate new sewer extensions required by the construction (January 31, 2007 e-mail attached to Exhibit 38), this kind of detail will be addressed at site plan review. Applicant notes in its "Land Use and Zoning Report" (Exhibit 33(c), p. 17) that gas, electric, telephone and cable television utilities are also available to the site. Fire and rescue are nearby, and Applicant has an approved fire access plan. Tr. 95.

Based on this evidence, the Hearing Examiner finds that the property will be served by adequate utilities and other services.

3. Schools

Technical Staff advises that the schools serving the subject property are located within the Albert Einstein Cluster. The current Annual Growth Policy (AGP) schools test finds capacity adequate in the cluster. Exhibit 38, p. 9. Technical Staff based this determination upon a December 11, 2006 letter from Bruce H. Crispell, the Director of Long-range Planning for the Montgomery County Public Schools. His letter is attached to the Technical Staff report, Exhibit 38.

Mr. Crispell conducted his evaluation on the assumption that the proposed development would have 28 townhouse units, and therefore his findings of adequate school capacity would apply with equal force to a smaller, 27 townhouse development. He stated in his letter that the anticipated 28 unit development would generate approximately 7 elementary, 3 middle and 5 high school students.

The subject property is served by the Oakland Terrace Elementary School, the Newport Middle School and the Albert Einstein High School. Mr. Crispell notes in his letter that Albert

Einstein High School is part of the “Downcounty Consortium,” where students may choose to attend their base area high school or one of four other high schools in the consortium.

Mr. Crispell reports that enrollment at Oakland Terrace Elementary School currently exceeds capacity and is projected to exceed capacity in the future. This space deficit will be addressed with the opening of Downcounty Consortium Elementary School #29 at the location of the former McKenney Hills Elementary School. Since the cluster’s elementary school capacity is dependent upon the reopening of the McKenney Hills Elementary School, the Hearing Examiner asked Applicant to ascertain when that school would be reopening. Applicant’s counsel followed up, obtaining an e-mail from Mr. Crispell on the subject (Exhibit 60(a)). Mr. Crispell does not currently have an opening date, but stated that “it should be within the 2001⁶ to 2013 period.” That time period would coincide well with the timeframe suggested by Applicant’s representative, Thomas Hudson, who testified that the project would likely not be completed before 2010. Tr. 198-199.

Mr. Crispell’s initial letter reported that enrollment at Newport Mill Middle School is currently within capacity and is projected to stay within capacity. Enrollment at Albert Einstein High School is currently over capacity, but is projected to be within capacity beginning in the 2010 – 11 school-year.

Mr. Crispell concludes that “[t]he current Growth Policy schools test finds capacity adequate in the Albert Einstein (DCC) cluster.” Given Mr. Crispell’s conclusion and the plan for added capacity for elementary school students, the Hearing Examiner finds that there is sufficient school capacity for the proposed development.

I. Environment

According to the approved Natural Resource Inventory / Forest Stand Delineation (NRI/FSD, Exhibit 10), there are .08 acres of wetland, but no forest on site. The Preliminary Forest Conservation

⁶ The Hearing Examiner presumes Mr. Crispell meant 2011, not “20011” because the latter would mean waiting another 18,004 years for the school to open, which would be slow even for a governmental bureaucracy.

Plan (Exhibit 11), conditionally approved by the Planning Board on May 10, 2007 (Exhibit 40), reports that the site is not in a special protection area, and there are no known rare, threatened or endangered species on the property. M-NCPPC's Environmental Staff also reported that there are no specimen or champion trees on site (Memo of April 18, 2007, attached to the Technical Staff report, Exhibit 38).

1. Stormwater Management:

Applicant's civil engineer, Seth Churchill, supervised the preparation of the stormwater management concept plan for this property. He noted that the property is not in a special protection area, and stated that Applicant was proposing to treat all impervious surfaces for quality, with three filters sprinkled throughout the site. Two are within the boundaries of the site and one is just off the site in the road right-of-way. Quantity control is already provided in the Wheaton Branch Regional Facility. Tr. 129-136. The proposed storm water management concept has been approved by the Department of Permitting Services (Exhibit 33(g)), and it will be reviewed at subdivision and site plan review.

The construction of the proposed development will require the movement of the existing storm drainage system. The potential impact upon neighboring properties of stormwater management in the subject development is discussed in Part III. J.1. of this report in connection with community concerns.

2. Forest Conservation:

The diagrammatic portion of Applicant's Preliminary Forest Conservation Plan (Exhibit 11)

is shown below:



The hatched area on the western end of the site is the afforestation area. M-NCPPC's Environmental Staff reviewed the application (Memo of April 18, 2007, attached to the Technical Staff report, Exhibit 38) and recommended approval of both the rezoning application and the Preliminary Forest Conservation Plan, the latter with two conditions:

- The applicant must reduce the forest conservation easement to exclude the proposed pathway and public access easement.
- The applicant must adjust the forest conservation worksheet to reduce the area of afforestation by the public access easement area.

These conditions were adopted by the Planning Board when it approved the Preliminary Forest Conservation Plan, as reported in its recommendation letter of May 18, 2007 (Exhibit 40).

Environmental staff also recommended that the proposed footpath connecting Douglas Avenue to Lillian Drive, if built within the wetland buffer, be constructed as a boardwalk to minimize fill placed in the wetland buffer. The width and location of the proposed crosswalk will be determined at site plan review, per Binding Element #4.

Technical Staff noted (Exhibit 38, p. 17) that Habitat for Humanity had agreed to build the donated MPDUs to "green building" standards, which would be environmentally beneficial (*See* letter in Appendix from Habitat for Humanity). Whether the MPDU lots are actually donated to Habitat for Humanity, as proposed by Applicant, will depend on the Planning Board's decisions at site plan review, as discussed earlier in this report in connection with the topic of Binding Elements. In any event, Technical Staff concluded that "the application with regard to environmental issues is in the public interest."

Based on this record, the Hearing Examiner is satisfied that any environmental concerns on the subject site are being appropriately addressed.

J. Community Concerns and Legacy Open Space

General Community Concerns:

There were a number of issues raised by the community prior to and during the hearing:

1. Stormwater management and the effects of redirection of the storm drainage system, since existing homes already experience flooding and sewage backups;
2. The impact of the development on traffic;
3. Dangers of the intersection at Georgia Avenue and Evans and the need to improve it for pedestrians, especially those seeking to access the park across Georgia Avenue;
4. Need for sidewalks on Evans Drive and Douglas Avenue;
5. Need for sufficient on-site parking;
6. Design of the pedestrian path connecting Douglas Avenue to Lillian Drive;
7. Need for buffering, landscaping, and architectural features to increase compatibility, and design of alleys so that they are not near existing townhouses;
8. Use of “green” construction techniques;
9. Preservation of open space and trees; and
10. Creation of a park through the Legacy Open Space (LOS) program.

1. Stormwater management and sewage backups:

The construction of the proposed development will require the movement of the existing storm drainage system. This fact and pre-existing sewage backups were raised as concerns by the community. Both issues were addressed in the testimony of Applicant’s witnesses.

At the hearing, Seth Churchill, a civil engineer, stated that he was certain that the relocation of the stormwater system and Applicant’s development will not make things worse for the upstream or downstream property owners. Tr. 130. He also indicated that Applicant will be increasing the capacity to some degree, and the stormwater situation will therefore be better from where it enters the subject site to where it exits. Tr. 130-131. Mr. Churchill supplemented his testimony with a memorandum dated May 29, 2007 (Exhibit 60(f)), in which he indicated that “the relocated pipe will have a greater capacity than the existing pipes, which should have a positive benefit on our upstream neighbors.” The proposed storm water management concept has been approved by the Department of Permitting Services (Exhibit 33(g)).

Other than the enlarged stormwater drainage capacity, Mr. Churchill indicated that he was not aware of anything Applicant could do to make any off-site flooding situation noticeably better. He noted that the water table was close to the surface in the area. The neighbors’ concern, however, seemed to be addressed to a sewage backup problem, more than a stormwater problem, and Mr.

Churchill further testified that the project's tie into the WSSC water and sewer facilities would not have any adverse impact on the adjacent townhouses or single-family communities. WSSC assured him that its capacity more than meets the demand which will be generated by the development. Tr. 136-138. WSSC has noted (January 31, 2007 e-mail attached to Exhibit 38) that relocating the storm drain will complicate new sewer extensions required by the construction; however, the Hearing Examiner agrees with Technical Staff's suggestion that these kinds of issues can be better addressed at site plan review. Exhibit 38, p. 17.

Given Mr. Churchill's un rebutted testimony, and the approval of DPS and WSSC, the Hearing Examiner finds that there is no evidence that the proposed development will make either the stormwater or the sewage backup situation any worse for the neighbors. In fact, it is likely to improve the stormwater management situation in the area by increasing capacity somewhat.

2. The impact of the development on traffic:

Russell Belcher, in his testimony on behalf of the McKenney Hills Carroll Knolls Civic Association, stated that community members are concerned, among other things, about traffic which may be created by the proposed development. As discussed in Part III.H.1. of this report, the proposed development will actually create less traffic than the existing use on the site, and therefore, the Hearing Examiner concludes that any community concern about increases in traffic is unwarranted.

3. Georgia Avenue and Evans Drive Intersection:

Community concern about pedestrian safety at the Georgia Avenue and Evans Drive Intersection was raised by an e-mail from neighbor Judith Furash, attached to the Technical Staff report, and by Mr. Belcher at the hearing. Tr. 216-217. Ms. Furash argued that a traffic signal is needed to safeguard pedestrians. This issue was thoroughly aired at the hearing in the testimony and cross-examination of Glenn Cook, Applicant's traffic engineer. Tr. 171-176.

The Hearing Examiner questioned Mr. Cook about the possibility of signaling the Georgia

Avenue/Evans Drive intersection. Mr. Cook testified that because Georgia Avenue is a state highway, the Maryland State Highway Administration (SHA) would have to approve it, and based on his prior experience as senior staff engineer to the Director of the Office of Traffic and Safety, who makes the decisions where signals go on state roadways, it is his opinion that the state would never approve the installation of a traffic signal at this location.

First, the traffic on Evans Drive does not warrant it because it does not produce 100 cars per hour for an eight hour period, which is the state criterion. Secondly, to warrant a signal at an intersection based on pedestrian volume, there must be a high concentration of pedestrians such as in a central business district, or where there are crossing guards and schools involved. At this particular location, he did not observe enough pedestrians to even consider that pedestrian warrant. Finally, the most recent accident records for the intersection show only one pedestrian accident over a two year period and only one vehicular accident (and the vehicular accident did not even involve another car). Usually, the state requires five accidents that are correctable by a traffic signal (normally right angle accidents) in a calendar year to justify the installation of a traffic signal.

Mr. Cook noted that the traffic signals to the north and south of the Georgia Avenue/Evans Drive intersection (at Plyers Mill Road to the north and Dennis Avenue to the south) would platoon the traffic through the area, which should provide enough opportunity for people to get across the street, especially with a pedestrian refuge in the middle, as Applicant is proposing. Even if the new development added more pedestrians, they would likely be crossing Georgia Avenue to the park during non-peak hours, and if the lights on either side did not adequately platoon the traffic, their timing could be adjusted.

Given the unlikelihood of a traffic signal being approved for this intersection, Applicant has proposed striping the crosswalks across both Evans Drive and Georgia Avenue at this intersection, with a pedestrian refuge in the median island on Georgia Avenue. These proposals are reflected in the revised SDP (Exhibit 60(d)), both in the site layout diagram and in a new binding element (#7), all of

which are subject to the approval of SHA and DPW&T. Tr. 73-75, 123-125.

Based on this evidence, the Hearing Examiner finds that Applicant's proposal addresses the pedestrian crossing concerns to the extent it has the power to do so, subject to SHA and DPW&T approving alternative methods.

4. Need for sidewalks on Evans Drive and Douglas Avenue:

Mr. Belcher also mentioned in his testimony that the community felt that additional sidewalks are needed for pedestrian safety in the area. Tr. 221. The revised SDP (Exhibit 60(d)) shows Applicant's proposal to have sidewalks on the three sides of the project that are adjacent to streets (Georgia Avenue, Evans Drive and Douglas Avenue), and on the pedestrian connection north to Lillian Drive. Tr. 72-73.

5. Need for sufficient on-site parking:

An e-mail from neighbor Catherine Tolnay (Exhibit 58(b)), presented by Mr. Belcher during his testimony, raised the concern as to whether the new development would provide sufficient on-site parking. As described in Parts III. E. and F. of this report, Applicant will provide a total of 68 off-street parking spaces, as shown on the Schematic Development Plan. The 23 market-rate units will provide 46 spaces in their two-car garages; the 4 MPDUs will provide 12 spaces in their one-car garages and two-car driveways; and there will be 10 additional off-street spaces for visitors. This exceeds the requirement of 54 spaces (2 per dwelling unit) called for in Zoning Ordinance §59-E-3.7. As Mr. Belcher noted at the hearing, "It looks as if there will be more than adequate parking within the development and it wouldn't impinge on the streets around it." Tr. 225.

6. Design of the pedestrian path connecting Douglas Avenue to Lillian Drive:

Binding elements 4 and 5 promise a 20 foot wide public use easement and construction of a pedestrian connection from the end of Douglas Avenue to the community on the north. These binding elements make it clear that the width and location of the pedestrian path will be determined at site

plan, which will give adjacent single-family and townhouse homeowners an opportunity for input on these matters.

7. Need for buffering, landscaping, and architectural features to increase compatibility, and design of alleys so that they are not near existing townhouses:

Technical Staff noted that there were community concerns about buffering, landscaping and separation of proposed alleys from existing townhouses. Mr. Belcher reported other concerns about matching brick and other architectural and aesthetic features. Tr. 223. These concerns were addressed by Applicant in its first three binding elements, which call for brick fronts and sides facing public rights-of way; street trees on the perimeter of a minimum 3½ inch caliper; and a landscape buffer and/or fencing along the northern property line, as mentioned in Part II. E. of this report. The Hearing Examiner finds it appropriate that the details of the buffering and the proposed architecture be worked out at site plan review.

The question of separation of alleys and structures from existing townhouses was addressed by Applicant's land use planner, Kevin Foster, at the hearing. Mr. Foster introduced an "Adjacent Site Exhibit," (Exhibit 52) which compared the distances between existing neighboring properties to those which will exist between the proposed development and its neighbors. It is reproduced below:



As discussed by Mr. Foster (Tr. 87-91), the proposed setbacks are comparable to, and in some cases greater than, the existing separations in the adjacent neighborhoods. The Hearing Examiner finds that the planned distances between alleys and structures in the proposed development and its neighbors do not render the proposed development incompatible with its surroundings.

8. Use of “green” construction techniques:

At the hearing, Mr. Belcher expressed his strong preference for “green” (*i.e.*, environmentally friendly) construction. Tr. 213-215. Although Applicant’s representative, Tom Hudson, expressed a similar affinity for green construction and energy efficient equipment (Tr. 196-200), the Hearing Examiner finds that these kinds of details are better left for review at site plan.

9. Preservation of open space and trees:

Technical Staff reported that preservation of open space was a major community concern (Exhibit 38, p. 17). Although this concern relates both to the planned use of the subject site by Applicant and to the suggestion that it be placed in the Legacy Open Space (*LOS*) Program, the latter issue attracted a great deal of community attention after the hearing, and it is therefore discussed in a separate section, below. Wholly apart from the *LOS* issue, Applicant has addressed the open space concerns of the community by preserving open space through a forest conservation easement on the western portion of the site; by enhancing that space through afforestation and the provision of a public footpath; and by agreeing to a binding element which will make the open space on the western side of the subject site available to the public, to the extent environment controls will permit. Tr. 61 and new Binding Element #9. In addition, there will be a “village green” on the eastern part of the property, surrounded on three sides by townhouses.

Other than the western part of the site, the property does not currently have any publicly available “open space.” The eastern side of the site is occupied by MCAD and its parking lot. There is no evidence in the record upon which the Hearing Examiner could base a recommendation that the

Applicant should convert more of its property to publicly available open space than is presently planned. In fact, the Zoning Ordinance provides a standard by which to assess the adequacy of green space on the site. Zoning Ordinance §59-C-1.74(d)(1) calls for a minimum of 45% green area on the site when a project includes MPDUs. The standard is 50% when no MPDUs are provided. In this case, Applicant will meet both standards, with the provision of 50% green area.

The Hearing Examiner therefore finds that Applicant has more than met the “preservation of open space” concerns of the community.

10. Creation of a park through the Legacy Open Space program:

Legacy Open Space:

Technical Staff raised the issue of Legacy Open Space in its report of May 4, 2007 (Exhibit 38). “The community members ideally want the property to be a park, since the area has served as *de facto* open space for residents for many years, and residents feel there is no other easily accessible neighborhood open space. One of the neighbors formally proposed that the property be considered for evaluation as Legacy Open Space. That request is being considered now.” Exhibit 38, p. 17.

The Legacy Open Space (LOS) Program is “a new plan to conserve Montgomery County’s most significant open space as a means of protecting the County’s environment, quality of life, and economic vitality.” *Council Resolution No. 14-970, adopted July 24, 2001*. In Resolution No. 14-790, the Council approved the Planning Board’s “*Legacy Open Space Functional Master Plan*,” which established the program as a part of the General Plan for Montgomery County. In order to discuss the issue raised by some community members, the Hearing Examiner takes official notice of Resolution No. 14-970, and of the *Legacy Open Space Functional Master Plan, Interim Reference Addition of July 2001*. However, it should be emphasized that neither the application to have the subject site acquired as Legacy Open Space, nor the *Legacy Open Space Functional Master Plan* is before either the Hearing Examiner or the Council for consideration at this time.

The *LOS Master Plan* (pages 20-23) organizes potential *LOS* sites into six resource categories (1. Environmentally Sensitive Natural Resources; 2. Water Supplies; 3. Heritage Resources; 4. Greenway Connection; 5. Farmland and Rural Open Spaces; and 6. Urban Open Spaces) and classifies identified sites into three classes (pages 23-25), with different levels of protection in the event of proposed development. The subject site has not been identified at this point in any of the three classes of potentially protected sites.

The *LOS Master Plan* also sets forth the procedure for adding new properties to the list (pages 26-27). This process allows applications to be filed by individuals, agencies or groups to have sites evaluated by Technical Staff and, after screening, the Planning Board and/or the Council. Apparently, in this case, the process was initiated by an individual, although a copy of that application is not in the record of this case. What is in the record is a May 9, 2007, memorandum (Exhibit 40(a)) from Dominic Quattocchi, of M-NCPPC's Legacy Open Space Staff, which was briefly referenced in, and attached to, the Planning Board's recommendation to proceed with rezoning in this case (Exhibit 40). In his memorandum, Mr. Quattocchi notes that the *LOS* application is pending, and states that additional time will be needed for *LOS* staff and the *LOS* Advisory Board to complete its review.

Technical Staff also discussed the *LOS* issue in its report (Exhibit 38, pp. 17-18), concluding that the proposed rezoning, not conversion to a park, was appropriate for this site:

Initial comments from Parks staff indicate that the property is not the most likely candidate for designation as Legacy Open Space, nor is it suitable for the full-size rectangular fields that the *2005 Land Preservation, Parks and Open Space Plan* says are needed in the Kensington Wheaton Planning Area (see memo [of Tanya Schmieler, Park and Planning Stewardship] in Appendix [to Exhibit 38]).

Zoning staff notes that the rezoning application does in fact propose to preserve open space through a forest conservation easement on the western portion of the site where the wetland is located, and will enhance that space through afforestation and the provision of the public footpath. Further, the application proposes a village green within the townhouse portion of the property.⁷ Given

⁷ Technical Staff also noted that Evans Neighborhood Park is directly across Georgia Avenue from the site and has recently been expanded. There are signalized crossings of Georgia Avenue to the north at Plyers Mill Road and to the

these facts, zoning staff concludes that approval of the [zoning] application would be in the public interest with respect to open space concerns.

When the *LOS* issue came up at the hearing, the Hearing Examiner asked Applicant's Counsel to address the issue of whether a rezoning application should be held in abeyance while a site is being considered for designation as Legacy Open Space. Tr. 29. She did so at the hearing (Tr. 27-29 and 108-115), and supplemented her position, at the Hearing Examiner's request, in a letter filed May 31, 2007 (Exhibit 60) and its attachments, Exhibits 60(g)-(k). The record was held open until June 11, 2007, for responses to Applicant's May 31, 2007 filing. There were no further comments on the *LOS* issue from the parties (Messrs. Klauber and Belcher), but while the record was still open, a number of neighbors filed letters and a petition opposing the development and seeking instead to have a park established on the subject site, possibly through the *LOS* program (Exhibits 61-73, 76-77).⁸

Applicant's position is that the rezoning application process should not be held up while the site is being considered for designation as Legacy Open Space, especially since the site is not currently listed by the *LOS Master Plan*. This position was supported by the testimony of Applicant's land use expert, Kevin Foster (Tr. 105-108) and by Robert Gough, Esquire, who testified as special outside counsel for Montgomery College in connection with the contract for sale of the MCAD property. Tr. 205-212. Montgomery College Foundation, Inc. is the current owner of the property, and it contracted to sell the property to Kaz Development for redevelopment.

According to Mr. Gough, Montgomery County initiated and supported Montgomery College's assumption of control over the programmatic and educational activities of the Maryland College of Art and Design, with the expectation and understanding that the property would be conveyed to

south at Dennis Avenue. Crossing Georgia Avenue may nevertheless be difficult, and as mentioned previously, Applicant has agreed to stripe the crosswalks and provide a pedestrian refuge on the median of Georgia Avenue. According to Technical Staff, the residents on the west side of Georgia are also served by two parks- Capital View-Homewood and McKenney Hills NP. These parks include tennis courts, basketball courts, playgrounds, and fields.

⁸ The Hearing Examiner refused to admit unsigned, post-hearing submissions, but the signed letters and petition were allowed.

Montgomery College to offset its expenses for assuming those operational costs, and then resold to obtain the highest possible price. Mr. Gough testified that Montgomery College expected that the subject site would be redeveloped for townhouse development, and that if the County wanted to consider this site for Legacy Open Space, it could have done so in 2003 or 2004, when Montgomery College acquired the assets of MCAD.

Mr. Gough indicated that the Foundation has authored a letter to Maryland-National Capital Park and Planning Commission stating that it supports the rezoning application, but it does not support designation of the subject property for the Legacy Open Space program. Exhibit 60(i).

There is clearly a segment of the community which would prefer that the site be made into a park (Exhibits 61-73, 76-77), but it is important to bear in mind that the decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Applicant’s proposal against the specific criteria established by the Zoning Ordinance, as well as compatibility and the public interest. The evidence produced by both sides must be considered in that analysis, but the facts and the law ultimately determine whether a rezoning application should be granted.

It is perhaps not surprising that many neighbors would like the subject site to be turned into a park, and there is a process available (the *LOS* program) for the County to consider acquiring the property for that purpose. Unless and until that happens, the owner of the subject site has the right to proceed with development of its property in accordance with County law.

The evidence in the record is overwhelming that the pending *LOS* application should not suspend the Council’s consideration of the subject rezoning application. When the Council approved the *Legacy Open Space Functional Master Plan*, it did so with the following express reservation (Res. No. 14-970, p. 3, incorporated into *LOS Master Plan*, at p. 13) :

For Legacy sites, this Plan does not alter zoning or other land use recommendations found in area master plans or functional master plans. **During the review of area master plans, the Planning Board and Council should identify the best land use and zoning for each site, without allowing a Legacy designation to influence the evaluation of zoning options.** Some Legacy sites may be developed in accordance with master plans and zoning if other funding priorities preclude protection. [Emphasis added.]

Brenda Sandberg, the Legacy Open Space Program Manager for the Montgomery County Department of Parks, referenced this provision in stating her position that the pending *LOS* application should not delay or influence the subject rezoning application (E-mail of May 29, 2007, Exhibit 60(g)):

In my opinion, it is clear that **the legislative intent of the Council was to apply this policy to all evaluations of land use and zoning for a property, including rezoning requests outside of the comprehensive master plan process.** The policy goal is to identify the best possible land use for any piece of property because, even if a site is designated as a Legacy Open Space resource, competition for funding among the many worthy Legacy Open Space sites may prevent acquisition or other protection of the resource. In fact, there are many designated Legacy Open Space sites where, for a variety of reasons, the site went through the development review process and fully developed according to the zoning applied to the property. [Emphasis added.]

Ms. Sandberg added that “we will evaluate the site over the coming months and make recommendations for designation, if any are warranted, when we are done with that process.” It is a maxim of statutory construction that an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight. As stated in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003), “We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers.” Thus, Ms. Sandberg’s comments carry considerable weight.

In addition to Ms. Sandberg’s e-mail, Applicant’s counsel, in her letter of May 31, 2007 (Exhibit 60, p. 2), cites case law holding that County law should not freeze the value of land to be

later acquired for a public purpose. In *Freeman v. State Roads Commission*, 252 Md. 319, 329-30, 250 A.2d 250, 255-56 (1969), a land owner successfully challenged the application to him, in a condemnation proceeding, of former Montgomery County Code §111-48f. That section had provided:

Any area reclassified by a local or a sectional or District plan map amendment shall exclude and be held to exclude any portion of the area which lies in the bed of a road, street, or alley, whether existing or proposed on a plan adopted by the Commission or other duly constituted public authority.

Prior to the condemnation proceeding, the land owner had sought to rezone an 80-acre tract from residential-agricultural (R-A) to commercial-apartment use (C-P). Because 7.94 acres of the tract had been delineated for highway use on a proposed master plan, the Council, relying on §111-48f, had withheld any change in zoning for the 7.94-acre portion, but rezoned the remainder of the tract. In the subsequent condemnation proceeding, the landowner objected to the admission of evidence that the 7.94-acre piece was restricted to agricultural use, because the County had unfairly frozen its value, prior to condemnation, by precluding its rezoning to commercial use.

The Court of Appeals agreed with the landowner, holding that “[a] verdict which may have been predicated on such evidence of value would constitute a taking of the property without just compensation in violation of Section 40 of Article III of the Maryland Constitution.” *Id*, 252 Md. at 331, 250 A.2d at 256 (1969).⁹

In sum, the Council’s language in the resolution approving the *LOS Master Plan*, the case law, the Planning Board, the Technical Staff and the agency that administers the *LOS* program all support the proposition that the subject rezoning should move ahead without regard to the possible later inclusion of the subject site in the *LOS* program. There is no rationale in the record weighing against this proposition; only the bald desire of some of the neighbors to have parkland conveniently

⁹ Applicant also points to the Council rezoning in LMA G-794 (Resolution No. 14-1204, 4/2/02), in the record as Exhibit 60(k), as an example of a case where a rezoning proceeded on land, “Bachelors Forest Tributary of NW Branch,” that had been designated as a Class III site in the *LOS Master Plan* (Exhibit 60(j)).

nearby.

The County may ultimately reach the conclusion that the property should be acquired for parkland, but that is not before the Hearing Examiner and the Council at this juncture. Therefore, the Hearing Examiner recommends that the Council's resolution contain a notation that it is not passing upon the question of whether the site is appropriate to be designated as Legacy Open Space. That question will be addressed in the first instance by Legacy Open Space Program officials, as well as the Planning Board and its Technical Staff, after due consideration of the pending request by some community residents that it be so considered.

IV. SUMMARY OF HEARING

At the inception of the hearing, Applicant's counsel, Stacy Silber, discussed a number of procedural matters. Tr. 5-35. At the time, she was unable to sign the affidavit confirming the mailing of notices to all abutting and confronting property owners, but she did file the affidavit of mailing on the following day, May 22, 2007 (Exhibit 59(b)).

Ms. Silber also indicated that the SDP's binding elements had been revised to comply with the Planning Board's condition that Applicant drop a binding element promising donation of the MPDU lots to "Habitat for Humanity or other affordable housing builder," if the Planning Board approved a plan for the MPDUs to be arranged in a single row. Another binding element was modified to allow for community input at site plan review as to the location and width of the pedestrian connection from the end of Douglas Avenue to the community to the north.

Ms. Silber introduced a letter from the Planning Board recommending approval of the proposed abandonment of County rights-of way (Exhibit 44), and explaining the status of the abandonment process, which she indicated would be before the Council by mid-June of 2007. She also stated that the State's abandonment of its right-of-way is proceeding, and that the land would be offered only to Applicant, per a letter from the SHA (Exhibit 33(n)).

The Hearing Examiner decided that the record would remain open until June 27, 2007, to allow time for Council action on the County ROW abandonment because if that abandonment were not permitted, it would dramatically change the structure of Applicant's proposal. Applicant will notify the Hearing Examiner and the parties when there is action on the abandonment.

Ms. Silber also discussed the impact of the request by some community members to have the site considered for the "Legacy Open Space" program. It was decided that Ms. Silber would submit a memo on the subject after the hearing, which she did (Exhibit 60).

Applicant called six witnesses, Kevin Foster, a land planner and landscape architect; Seth Churchill, a civil engineer, Michael Staiano, an acoustical engineer; Glenn Cook, a transportation planner; Tom Hudson Applicant's representative; and Robert Gough, Esquire, special outside counsel for Montgomery College in connection with the contract of sale for the Maryland College of Art and Design property.

The only other witness to testify was Russell Belcher, who testified on behalf of the McKenney Hills Carroll Knolls Civic Association, as its "MCAD Liaison." The McKenney Hills Carroll Knolls Civic Association did not take a position either for or against the application. There was no opposition testimony.

A. Applicant's Case in Chief

1. Kevin Foster (Tr. 36-124):

Kevin Foster testified as an expert in land planning and landscape architecture. He stated that he was responsible for writing the land use report which is Exhibit 32(c), and for designing the site layout in the SDP. Mr. Foster described the site's location as south of Wheaton, about halfway between Wheaton Town Center and the Beltway; seven tenths of a mile from the Wheaton Metro Stop to the north and the Forest Glen Metro stop to the south.

Mr. Foster testified that the MCAD structure is an approximately 13,000 square foot, one

story, “1950's post modern institutional style building.” Tr. 41. There is a 60-car asphalt parking lot and loading area to the rear, and there are circulation drives to the front. Two driveways currently come from the parking lot out to Evans Drive. The majority of the existing public rights-of-way on the subject property constitute unbuilt portions of Douglas and Gardner Avenue. These areas of the existing public rights-of-way also contain wetland areas, trees and open space areas that are currently not developed as public rights-of-way. Mr. Foster discussed both the state’s abandonment proceedings and the County’s abandonment of 28,317 square feet of right-of-way.

Mr. Foster then introduced Exhibits 47 and 48, which contain panoramic photos of the site with keyed maps, and he discussed some of the photos. Mr. Foster used Exhibit 50, a color rendering of the proposed schematic development plan superimposed on an aerial photograph of the subject property, to describe the proposed development. It will be 27, rear garage, three-story townhouses to be located generally on the eastern portion of the site between Douglas Avenue and Georgia Avenue. The abandonment that is being requested will abandon the northern sections of Douglas Avenue, Gardner and Gardner Avenue.

On the northwest corner of the site, Applicant proposes to construct a section of Douglas Avenue with a cul-de-sac to provide an adequate termination for that public right-of-way. There will be two groups of townhouses that will front on Georgia Avenue to create a residential edge along that street. They will be accessed via rear alley that connects to the Douglas Avenue cul-de-sac. There will be a group of townhouses that will front on Evans Drive, to create a residential street front along that roadway. As you come in Douglas Avenue, there will be three groups of townhouses created around a public open space and their garages will be served off of the internal circulation that's provided. There will be enhanced streetscaping along Georgia Avenue, Douglas Avenue and Evans Drive. There will also be a landscape buffer along the northern property line between the subject property and the Plyers Mill Crossing Townhouses to the north.

Mr. Foster further testified that there are currently existing storm drains that cross diagonally from northwest to southeast along the subject property. They were installed quite a few years ago, and as part of the development, the Applicant is proposing to relocate them within the public right-of-way that's remaining at Douglas Avenue. They will come down to the corner of Douglas and Evans, turn and go eastward, connecting back up at the intersection of Evans Drive and Georgia Avenue.

Binding elements #4 and #5 promise a 20-foot-wide public use easement and construction of a pedestrian connection from the end of Douglas Avenue to the community on the north, with the width and location of the pedestrian path to be determined at site plan. Applicant will be constructing a pedestrian path in that location, after consulting with the adjacent single-family and townhouse homeowners to find the best location. There are also a number of trees that need to be saved in that area.

One of the other elements of the revised schematic development plan, will be a large environmental open space created in the northwest corner of the site that will protect the existing wetland and tree area that exists there today. Applicant anticipates cleaning up the invasive species that are in there today, reforesting, and trying to maintain and increase the quality of that open space for wildlife habitat and for viewing. The parcel itself will be in a forest conservation easement, so no one will be able to go in there and cut any trees down or disturb the environmentally sensitive area. It is also a wetland, and it is subject certain State and federal regulations. Even though it is going to be owned by the HOA, Applicant agreed to a new binding element #9 making the forest conservation area available to the public (not just residents of the subject site), to the extent permitted by Technical Staff at site plan. Tr. 61.

Mr. Foster further testified as to the surrounding area. For floating zone cases, the surrounding area in general is defined as the area most directly affected by the proposed development. In his analysis, the area that is most directly affected by the subject property development is the area between Plyers Mill north of the subject property, south to Dennis Avenue and from the rear of the lots on the

east side of Georgia Avenue, west to Hutting Place and Hayward Drive. The surrounding area is shown as a red dashed line on Exhibit 51, and Mr. Foster's definition was adopted by Technical Staff.

The surrounding area includes large section of the Carroll Knolls Subdivision to the southwest of the subject property. This area was constructed in the late '40s and early '50s right after World War II, mostly consisting of one story and one-and-a-half story, brick, single-family, detached, residential houses built in the R-60 Zone. The surrounding area also encompasses part of the Plyers Mill Estate Subdivision northwest of the subject property, which includes the single-family detached houses along Lillian Drive and Harmon Road. To the north of the subject property, the surrounding area also includes two townhouse subdivisions. The Plyers Mill Crossing Subdivision, just to the north of the subject property is an RT-12.5 subdivision that has an effective density of approximately 12 dwelling units to the acre, and that property fronts on Georgia Avenue and Lillian Drive to the west and abuts the subject property to the south.

Other parcels in the surrounding area are in the Georgia Square Townhouse Subdivision, a relatively new development at the intersection of Georgia Avenue and Plyers Mill Road. This townhouse subdivision is on the southwest quadrant of that intersection. It is zoned RT-15 and has an approximate effective density of 15.5 dwelling units an acre, through the use of MPDUs. The remaining surrounding area includes the lots that front on Georgia Avenue across from the subject site. Their effect is more visual impact, than direct physical impact, from the subject property.

Mr. Foster testified that the Master Plan for the Communities of Kensington and Wheaton is the master plan that encompasses the subject property. The Master Plan is silent on the zoning recommendations for this property, showing the site as a quasi-public use because the college was located on it. It recommends low to medium density residential for the area. In Mr. Foster's opinion, the proposal is in general conformance with the goals and objectives of the Master Plan, and it will be compatible with the existing surrounding uses and the purpose clause of the R-T Zone. Specific

compliance with recommendations of the Master Plan is not a requirement for reclassification into the R-T Zone.

On page 28 of the Master Plan, the goals and objectives include protecting and stabilizing the extent, location and character of existing residential and commercial land uses. The objective is to maintain well established, low and medium density residential character, which prevails over most of the planning area, and preserve the identity of residential areas along major highway corridors, to soften the impact of major highways on adjacent homes. According to Mr. Foster, Applicant's proposal will do so. It will also provide a buffer and transition from east to west for the Carroll Knolls Subdivision, creating a buffer from the activity and noise along Georgia Avenue for the houses further in the Carroll Knolls Subdivision.

The land use plan highlights of the Master Plan also recommend that predominantly low to medium density residential character of the area be maintained and protected. The Plan recommends that residential areas along major highways should be reinforced and protected by land use and landscaping approach called "green corridors." Applicant's proposed development on the subject property will provide the medium density residential housing that is compatible with existing townhouses and single-family residences, and will provide additional transition between the R-60 developments of the Carroll Knolls Subdivision with a higher density of developments to the north.

Some of the key land use indicators are referred to on page 18 of the Master Plan. Existing land use is predominantly low-density, single family residential, except for major intersections along the corridor. Mr. Foster opined that the proposed townhouse development of approximately 10.7 dwelling units per acre will be consistent with existing development character and established fabric of the community. It is appropriate for the highway corridor site. At the same time, the proposed development will reinforce the residential architectural edge along Georgia Avenue, provide green streetscaping, soften the impacts of the highway, create a higher quality pedestrian zone and create a

buffer between Georgia Avenue and single-family residences to the west. It will be replacing the existing institutional use with a residential use to fortify this residential edge, and will be doing the same along Evans Drive.

As far as the transportation network, the Master Plan looks to provide sidewalk and trail networks that adequately serve both transportation and recreational needs of pedestrians. The subject proposal will provide additional community linkage through the creation of the pedestrian link between Douglas Avenue and Lillian Drive to the north. It will also provide sidewalks along Georgia Avenue as part of the enhanced streetscape. Applicant is also proposing striped crosswalks at Georgia Avenue and Evans, and also across Georgia Avenue, with a pedestrian refuge in the median island to facilitate safer crossing of Georgia Avenue for pedestrians. Applicant agreed to make this a new binding element #7, subject to the approval of SHA and DPW&T. Tr. 73-75.

In the environmental section, on page 36, the Master Plan seeks to protect water quality of the streams, and to prevent erosion and flood damage in the Kensington/Wheaton area. It also seeks to promote the conservation of selected areas in their natural undeveloped state, with active recreation uses in some instances. Again, Applicant is proposing to protect this environmentally sensitive area and to create recreational opportunities, within the bounds of protecting that environmental area.

In the transportation and mobility plan (Chapter 5), the Master Plan seeks to promote non-motorized mobility by providing a trail network to serve pedestrians and bikers. The proposed development will provide multi-use linkage between Douglas Avenue and the areas north. The trail connections will also allow visual access to the natural wetland area preserved on the site. Interior sidewalk connections will be provided from Douglas Avenue, east-west to Georgia Avenue, for pedestrian interconnectivity and access to the bus transportation along Georgia Avenue.

Chapter Six of the Master Plan encourages the acquisition and maintenance of natural area, open spaces and recreational facilities. Directly across Georgia Avenue from the subject property is

the recently expanded Evans Parkway local park. Applicant proposes to re-stripe the crosswalk across Georgia Avenue and to add a median refuge for pedestrians, which will increase crosswalk safety and provide for additional access from the subject property to the Evans Parkway Park. Moreover, as part of the proposed abandonment and the schematic development plan, a contiguous open space will be created to protect the environment and provide recreational opportunities for the community, consistent with the Master Plan goals.

Mr. Foster further testified that although specific compliance with the recommendations of the Master Plan is not a requirement for classification in the R-T Zone, the proposal must be shown to be appropriate for residential densities allowed in the R-T Zone or in locations in the County where there is a need for buffer or transition between commercial, industrial or high density apartment uses and low density one-family uses. It also must be compatible with the surrounding uses and in the public interest. In Mr. Foster's opinion, the proposed development is not designated, but it is both appropriate and transitional or buffering. Tr. 85. The proposed townhouse development will provide a better transition to the single-family residences located to the west in the Carroll Knolls Subdivision and to the townhouses located immediately to the north, than does the existing institutional use.

According to Mr. Foster, the proposal for the townhouse development is compatible with the nearby single-family residential uses (both detached and townhouse) in height, scale and massing. It is very similar in scale to the townhouse subdivision to the north. Mr. Foster described Exhibit 52 as a plan showing the schematic development plan superimposed on the local neighborhood, showing setbacks from the proposed townhouse units to the existing neighborhood units to the east, west, north and south and also many of the individual setbacks between the existing townhouses in the Plyers Mill Crossing Subdivision to the north. He observed that in the subject property, the internal setbacks will be the same or greater, which he found compatible with the nearby townhouses.

Mr. Foster opined that the rezoning would provide the maximum freedom in terms of design

and layout. It will enable the provision of certain amenities to the proposed townhouses that are normally associated with less dense zones, particularly the creation of a large section of open space.

“It's not something usually associated with higher density quasi-urban townhouse developments.” Tr.

89. There will also be no detrimental effects to the adjacent community, and by implementing the goals and objectives of the Master Plan, the proposed rezoning will be in the public interest and therefore will promote the health, safety, welfare and morals of the existing community and County as a whole. The public interest will also be served by the provision of additional housing necessary to support the growth in Montgomery County, and by providing affordable housing.

Mr. Foster noted that the SDP complies with the row design provisions of the R-T Zone, as well as the other development standards. He testified that the proposed rezoning will not overburden the existing public facilities. The property is located within the existing water and sewer envelope. Water and sewer lines currently run down Douglas Avenue, and there are also water and sewer lines in Evans Drive and Georgia Avenue. The property is served by existing roadways, and the site will generate fewer trips than the existing MCAD school does today. It is convenient to public transportation, including bus and rail, and public schools have been deemed to have adequate capacity. MCPS projected that the proposed development will generate seven elementary, three middle school and five high school students, and Applicant's counsel will follow up with MCPS to find out when the new elementary school will be opening. Fire and rescue are nearby, and Applicant has an approved fire access plan.

As to concerns raised by the northern neighbors about the proximity of the private driveway to their townhouse development and the fact that the backs of some proposed townhouses would face them, Mr. Foster testified that the tree buffer that Applicant added to the SDP along the northern property line, in addition to the existing vegetation, should be an adequate shield. Tr. 101-102. Applicant is also proposing street trees along Douglas Avenue, and binding element number 2

provides that they will be a minimum of 3½ inch Caliper.

Mr. Foster described the Legacy Open Space program as a public program to acquire what is considered to be valuable open space within the County. In his opinion, consideration of the subject site for that program would not have any ultimate impact on this proposal moving forward through rezoning. [Applicant's counsel expressed the same view, but she indicated she would file a post-hearing memo on the subject.]

Mr. Foster testified that Applicant will be providing 68 off-street parking spaces, 14 more than the 54 required by the Zoning Ordinance. The market rate units will have two-car garages, but will not have any space in their driveways; the MPDUs will have one car garages and driveways with space for two cars. Mr. Foster also explained how the illustrative SDP chart detailing recreational facilities was composed. For example, recreational facility demand for 100 dwelling units is 17 points for "tots" in Technical Staff's point system. Since this development will have only 27 dwelling units, recreational demand for tots would be 4.59 ($.27 \times 17 = 4.59$). By supplying two sitting areas, one open play area and a pedestrian system, Applicant will be providing a supply valued at 5.46 points, an amount above the demand figure. The final figures will be calculated at site plan.

On cross-examination, Mr. Foster was asked about the possibility of placing a traffic light at the intersection of Georgia Avenue and Evans Drive. He replied that Applicant will be striping the crosswalk and providing a pedestrian refuge on the median. Moreover, there are traffic lights at the Plyers Mill Road/Georgia Avenue and the Dennis Avenue/Georgia Avenue intersections, which provide a break in the traffic flow, so pedestrians have the opportunity to cross with traffic lights on either side of them. Tr. 123-125.

2. Seth Churchill (Tr. 125-140):

Seth Churchill testified as an expert in civil engineering. He prepared the engineering studies that have been needed to get preliminary approvals and to make sure that the site is suitably situated,

and meets the appropriate codes. In his opinion, it is a good fit for the site.

Mr. Churchill also supervised the preparation of the storm water management concept plan for this property. He noted that the property is not in a special protection area, and stated that Applicant was proposing to treat all impervious surfaces for quality, with three filters sprinkled throughout the site. Two are within the boundaries of the site and one is just off the site in the road right-of-way. Quantity control is already provided in the Wheaton Branch Regional Facility. The proposed storm water management concept has been approved by the Department of Permitting Services (Exhibit 33(g)).

When asked about flooding which currently exists on neighboring properties, Mr. Churchill stated that he did not have any specific knowledge of the exact nature of the flooding. He was certain, however, that the relocation of the stormwater system and Applicant's development will not make things worse for the upstream or downstream property owners. He also indicated that Applicant will be increasing the capacity to some degree, and the stormwater situation will therefore be better from where it enters the subject site to where it exits. Mr. Churchill was not aware of anything specific Applicant could do to make the off-site flooding situation noticeably better. He noted that the water table was pretty close to the surface in the area. The homes on the proposed site have slab foundations, with the garage on the ground floor.

Mr. Churchill further testified that the project's tie into the WSSC water and sewer facilities would not have any adverse impact on the adjacent townhouses or single family communities, and that water, sewer, gas and other utilities are available and adequate to serve the proposed development. WSSC has told him that their capacity more than meets the demand which will be generated by the development.

3. Michael Staiano (Tr. 141-160):

Michael Staiano testified as an expert in acoustical engineering. He stated that the

requirements for outdoor noise and activity areas is for a day/night average sound level (also known as an L_{DN} , which is a weighted 24 hour average sound), not to exceed 65 decibels. For indoor areas, inside dwellings, the day/night average sound level may not exceed 45 decibels. In his opinion, the proposed project, as depicted on the schematic development plan, “can” satisfy those guidelines. Tr. 144-146. Mr. Staiano’s study reflected that outdoor deck areas for three of the units would exceed maximum permitted sound levels. These will be dealt with by either not including deck areas for those units or by enclosing them.

Because Mr. Staiano’s report did not address the indoor sound levels, the Hearing Examiner questioned him further on how he reached his conclusion. Mr. Staiano explained that the actual calculations of indoor noise will be done later, but that with appropriate building materials and design, the required acoustical levels can be reached indoors. The Hearing Examiner therefore asked for a binding element assuring that the buildings will be designed to meet the required acoustical levels, both outdoor and indoor. Applicant’s attorney agreed to this request (Tr. 148), and new Binding Element #8 reflects this commitment. The proposed development may help to shield residences west of the subject site from some of the Georgia Avenue road noise, but Mr. Staiano has not done that analysis yet.

4. Glenn Cook (Tr. 161-184):

Glenn Cook testified as an expert in transportation planning and traffic engineering. He prepared a letter report dated April 9, 2007 (Exhibit 33(j)) which looked at the existing use on the subject property and compared it to the proposed use. The existing property contains the Montgomery County Art and Design College (MCAD). Using enrollment figures, Mr. Cook made projections as to how many cars could be generated by the existing site based on the existing enrollment figures, and he compared that to what would be projected to be generated by 27 townhouse units. He concluded that the 27 townhouses would generate significantly less traffic than what the college was projected to

generate. However, because of concerns raised by the community, Mr. Cook subsequently did an actual traffic count at MCAD, and determined that, using either methodology, the proposed 27 townhouses would generate less traffic than what is currently being generated by the MCAD property.

Mr. Cook reported these findings in a revised traffic study (Exhibit 54(a)). During the morning peak hour, he observed 45 vehicles entering or leaving the college through one or both of the driveways. During the evening peak hour he observed 25 vehicles doing the same thing. Based on the trip generation calculations which Park and Planning requires for a townhouse unit, the proposed plan would only generate 13 trips during the morning peak hour and 22 trips during the evening peak hour. The trip generation calculations are based on averages, but they are very conservative. Mr. Cook therefore concluded that, regardless of the method used, the townhouse development would actually reduce traffic at the site.

Mr. Cook further testified that the current access points to the site along Evans Drive are close to Georgia Avenue, while under the proposed plan, the access to the 27 townhouse units is proposed along Douglas Avenue, which creates a much safer means of ingress and egress to the property because the two proposed access points would be much further from Georgia Avenue. There will be no access to the proposed development along Evans Drive. Mr. Cook opined that access and circulation within the proposed development are adequate, safe and efficient.

The Hearing Examiner questioned Mr. Cook about the possibility of signaling the Georgia Avenue/Evans Drive intersection. Mr. Cook testified that the state would have to approve it, and based on his prior experience as senior staff engineer to the Director of Office and Safety, who makes the decisions where signals go on state roadways, it is his opinion that the state would never approve the installation of a traffic signal at this location.

First, the traffic on Evans Drive does not warrant it because it does not produce 100 cars per hour for an eight hour period, which is the state criterion. Secondly, to warrant a signal at an

intersection based on pedestrian volume, there must be a high concentration of pedestrians such as in a central business district, or where there are crossing guards and schools involved. At this particular location, he did not observe enough pedestrians to even consider that pedestrian warrant. Finally, the most recent accident records for the intersection show only one pedestrian accident over a two year period and only one vehicular accident (and the vehicular accident did not even involve another car). Usually, the state requires five accidents that are correctable by a traffic signal (normally right angle accidents) in a calendar year to justify the installation of a traffic signal.

Mr. Cook noted that the traffic signals to the north and south of the Georgia Avenue/Evans Drive intersection (at Plyers Mill Road to the north and Dennis Avenue to the south) would platoon the traffic through the area, which should provide enough opportunity for people to get across the street, especially with a pedestrian refuge in the middle, as Applicant is proposing. Even if the new development added more pedestrians, they would likely be crossing Georgia Avenue to the park during non-peak hours, and if the lights on either side did not adequately platoon the traffic, their timing could be adjusted.

5. Thomas Hudson (Tr. 184-205):

Thomas Hudson testified that he is a real estate developer, and is Applicant's authorized agent and an equity partner in the redevelopment of MCAD, which is owned by Montgomery College Foundation. Applicant Kaz Development is the contract purchaser of the property. Mr. Hudson described his efforts at community outreach on this project, stating that he had four general community meetings over the last year and a half. The first one was in February 2006 with the McKenney Hills/Carroll Knolls Civic Association. After that he had another general community meeting with the Plyers Mill Estates Homeowners Association, which is the townhouse community just north of the subject property. That was in July of 2006, and then again in November of the same year he had another meeting with Plyers Mill Civic Association. Shortly thereafter he had a second

meeting with the Carroll Knolls/McKenney Hills Civic Association.

In addition, Mr. Hudson had five or six one-on-one meetings with local residents, along with other e-mail exchanges and phone calls over the last year and a half. He introduced sign-in sheets for the general meetings as Exhibit 55. He testified that binding elements numbered 1 through 4 resulted from these meetings. Mr. Hudson testified that Applicant is committed to providing the 12.5 percent MPDUs required by law.

Mr. Hudson stated that he was very much interested in working with Habitat for Humanity. To do so, and have Habitat build the MPDUs, all those units would have to be in the same stick to make the actual construction efficient. Applicant would be giving up some profit by donating the units which it could sell to the builder for a nominal amount of money. If the MPDUs were not in one stick, then it would be difficult to have Habitat building them and a different builder constructing the market units in any given row. So, the MPDUs would have to be consolidated in one stick to make that particular program work.

[Applicant's attorney noted, in this connection, a memo attached to the Technical Staff report from Sharon Suarez, who is the housing coordinator for Park and Planning. Under the discussion portion, Ms. Suarez says, "Garage townhomes are actually considered so desirable that they are exempted from the concerns of site aggregation in the MPDU site plan guidelines for projects," citing to a Montgomery County Planning Board 1995 guideline. And then Ms. Suarez says (at the bottom of that same page), "generally the guidelines indicate that a certain amount of aggregation of MPDUs is considered appropriate in order to provide builders with necessary economies of scale."]

On cross examination, Mr. Hudson explained his efforts at green construction for the site. This effort would begin with trying to recycle parts from the MCAD structure, and would involve both the interior and exterior of the new structures, including energy and water efficient equipment.

Mr. Hudson estimated that it would take the balance of this year and into next year just to get

through the subdivision process, and then Applicant has to go into site plan. He estimates that site plan element would not be completed until the latter part of 2008. If so, construction could commence sometime during 2009, and completion probably would be in 2010.

6. Robert Gough, Esquire (Tr. 205-212):

Robert Gough, Esquire, testified that he is special outside counsel for Montgomery College in connection with the contract of sale for the Maryland College of Art and Design property. Montgomery College Foundation, Inc. is the current owner of the property. It contracted to sell the property to Kaz Development for redevelopment. Prior to ownership of the property through the Foundation, it was owned by the Maryland College of Art and Design. According to Mr. Gough, Montgomery County initiated and supported Montgomery College's assumption of control over the programmatic and educational activities of the Maryland College of Art and Design, with the expectation and understanding that the property would be conveyed to the Montgomery College to offset its expenses for assuming those operational costs, and then resold to obtain the highest possible price. Mr. Gough testified that Montgomery College expected that the subject would be redeveloped for townhouse development, and that if the County wanted to consider this site for Legacy Open Space, it could have done so in 2003 or 2004.

Mr. Gough indicated that the Foundation has authored a letter to Maryland-National Capital Park and Planning Commission stating that it supports the rezoning application, but it does not support designation of the subject property for the Legacy Open Space program. Exhibit 60(i).

B. Community Response

Russell Belcher on behalf of McKenney Hills Carroll Knolls Civic Association (Tr. 212-228):

Russell D. Belcher testified on behalf of the McKenney Hills Carroll Knolls Civic Association. He stated that the McKenney Hills/Carroll Knolls Civic Association has not reached an official consensus position with regards to accepting or rejecting the MCAD project. However, there

are numerous components of the project that are critically important to the community.

Mr. Belcher asked that all binding elements be adopted paying particular attention to environmental and aesthetic considerations. Particularly important are green features not only with regard to the MPDUs but the overall project. Participation of Habitat for Humanity is heartily¹⁰ welcomed because they have experience in building green structures. Although Habitat was mentioned in discussions with Mr. Hudson, if another entity comes up, that would also be fine with the community.

Mr. Belcher then described some of the green features he would like to see in the project, as set forth in Exhibit 57, which recites his testimony.

Mr. Belcher further testified that access to neighborhood parks and pedestrian safety are issues about which the community is very concerned. McKenney Hills Park and Capitol View Park are about 8/10th of a mile to a mile away from the proposed townhouses. The nearest park would be just across the road, but that road is Georgia Avenue, and many people have expressed concern about pedestrian safety, especially for children and handicapped people because they could get stuck even with the island that's going to be created. He therefore seeks some coordination of signalization to create platooning of vehicles to make it safe for a continuous crossing. Mr. Belcher agreed, given the evidence from Mr. Cook, that it was unlikely that the state would approve a traffic signal at Georgia Avenue and Evans Drive.

Mr. Belcher also expressed the concern of the community about losing access to the wetlands on the west side of the site, and he strongly supported the binding element agreed to by Applicant that would make it available to the public as well as to residents of the new community to the extent that the environmental regulations permit.

The next community issue involved storm water and sewer issues. There is great concern by

¹⁰ The court reporter incorrectly transcribed the word "heartily," as "hardly."

residents on Lillian Drive about having an adequate and separate sewage system for the new townhouses. The residents state that storm water and high water table had nothing to do with previous basement flooding; rather, sewage backup was the problem.

According to Mr. Belcher, many community members are concerned about traffic, density, flow and speed. Although a traffic study is not required, many residents on Douglas Avenue and Evans Drive might be reassured if one were carried out. Lack of sidewalks on Evans and Douglas and many other major entry points to the community make pedestrian safety a major concern. Some of the people on Douglas are concerned about cut-through traffic. Douglas is kind of a narrow street, and there are no sidewalks whatsoever. He recognized that Applicant's SDP calls for sidewalks along Georgia, Evans and Douglas.

As to aesthetic issues, the community requested appropriate alleyway screening of brick materials to match walls and brick fronts of townhouses fronting Douglas Avenue in the site area, and landscaping as required. Mr. Belcher recognized that Applicant has agreed to do so in binding elements. He also discussed the heights of the structures and the pitch of the roofs.

Mr. Belcher submitted two e-mails (Exhibit 58(a) and (b)), which raised concerns about possible loss of trees in the wetland area and the need for sufficient on-site parking. However, Mr. Belcher concluded, "It looks as if there will be more than adequate parking within the development and it wouldn't impinge on the streets around it." Tr. 225.

Mr. Belcher noted that it is very important that the County eventually codify certain aspects of building code to incorporate green features, things that need to be done to reduce our energy footprint and waste and filling up of landfills. It is an important issue for people in the community, as well as the traffic and safety issues. He agreed that since his organization has not reached an official consensus position that it should be listed as neither supporting nor opposing the application.

C. People's Counsel

Martin Klauber, the People's Counsel, did not participate in the hearing, but he did send a note (Exhibit 53) to the Hearing Examiner during the hearing regarding the issue of "Legacy Open Space" (Tr. 162), and he later reviewed the revisions to the Binding Elements suggested at the hearing (Exhibit 60(c)).

V. ZONING ISSUES

Zoning involves two basic types of classifications, Euclidean zones and floating zones. The term "Euclidean" zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28)*, Md. Code Ann., § 7-110.

Montgomery County has many floating zones, including the R-T Zones. The R-T 12.5 Zone contains development standards and a post-zoning review process that generally delegate to the Planning Board the details of site specific issues such as building location, stormwater control,

vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a rezoning.

When the reclassification sought by an applicant is recommended by the applicable Master Plan, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Master Plan does not recommend the reclassification sought, the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval, unless the Planning Board has recommended approval. Zoning Ordinance §59-H-8.2(b). As mentioned earlier, the *Master Plan for the Communities of Kensington-Wheaton* (May 1989, as amended April 1990), does not specifically recommend the R-T Zone for the subject site, but the Planning Board did recommend approval, and therefore a simple majority of 5 members of the Council is required for approval pursuant to Zoning Ordinance §59-H-8.2(b).

As discussed in Part III.G. of this report (pp. 23-26), compliance with Master Plan recommendations is not mandatory in this case because the R-T Zone does not require it; rather, the courts have held that the Master Plan should be treated only as a guide in rezoning cases like this one. See *Richmarr Holly Hills, Inc. v. American PCS, L. P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997).

In order to determine the manner in which that guidance should be applied in this case, we return now to the three areas of Council review discussed above, the purpose and requirements of the zone, compatibility with land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause

The intent and purpose of the R-T Zone, as stated in Code §59-C-1.721, is set forth below.

The purpose of the R-T Zone is to provide suitable sites for townhouses:

- (a) *In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*

- (b) *In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.

As is evident from the statutory language, the R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses.

The relevant Master Plan did not designate the subject site for the R-T Zone, and thus the Purpose Clause cannot be satisfied under that criterion. However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones*” or in areas “*where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*”

The evidence in this case supports Applicant’s contention that the subject site satisfies both the “appropriateness” and the “transitional” criteria. Tr. 85. Applicant’s land use planner, Kevin Foster, testified that the proposed townhouse development is appropriate for all the reasons discussed at length in Part III.G. of this report (pp. 23-26), in connection with the issue of Master Plan compliance.

Technical Staff opined that “the subject property is a suitable location . . . for townhouses with densities allowed in the R-T 12.5 Zone, specifically at densities of up to 10.7 dwelling units per acre, as proposed.” Exhibit 38, p. 10. The Planning Board, in recommending approval of the rezoning , expressly adopted Technical Staff’s rationale, and found the site to be appropriate for the subject development. Exhibit 40, p. 2. The proposed densities also are appropriate, according to Technical Staff, because of the close proximity of two Metro stations.

It should also be noted in this connection that the proposed development is appropriate because it is unlikely to cause any adverse impact upon its neighbors, one of the goals set forth in the zone’s purpose clause. It is a good fit in this mixed residential neighborhood; it will provide more parking than required; and it would not generate enough peak hour trips to create traffic problems for the neighbors. As discussed in Part III. F. of this report, the Hearing Examiner concluded that anticipated traffic noise levels from Georgia Avenue do not render this site inappropriate for residential development because they can be adequately buffered by accepted building techniques, which Applicant has agreed to in Binding Element # 8, with the details to be worked out at site plan. Based on this record, the Hearing Examiner concludes that the subject site is appropriate for the proposed R-T 12.5 development.

As to the “transitional” criterion, Mr. Foster testified that the proposed development would provide a better transition to the single-family residences located to the west in the Carroll Knolls Subdivision and to the townhouses located immediately to the north, than does the existing institutional use. Tr. 69-89. Staff noted that there are townhouses to the north of the subject property that are more dense, and single-family homes to the south and west that are less dense. Thus, the subject property provides a suitable “stepping down” of density from the townhouses to the single-family homes. The existing and proposed townhouses would also provide a suitable transition in density from the more intense commercial densities to the north in Wheaton Plaza and the large tracts

of single-family housing to the south, west, and east. Exhibit 38, p. 10.

Based on this evidence, the Hearing Examiner also concludes that the proposed development would satisfy the third criterion by providing a buffer or transitional uses between commercial uses to the north in Wheaton Plaza and low-density one-family uses to the south. It also should provide some buffer for single-family homes to the west of the site from the noise generated by Georgia Avenue.

Although only one of the three alternatives need be satisfied, the Hearing Examiner finds that the proposed development satisfies both the “appropriateness” and the “transitional” criteria, and therefore complies with the Purpose Clause of the R-T 12.5 Zone. It also meets all the development standards and special regulations of the Zone, as demonstrated in Part III. F. of this report.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. According to Mr. Foster, the proposal for the townhouse development is compatible with the nearby single-family residential uses (both detached and townhouse) in height, scale and massing. It is very similar in scale to the townhouse subdivision to the north. Moreover, the internal setbacks will be the same or greater, which he found compatible with the nearby townhouses. Tr. 68-89.

Technical Staff stated that the proposed townhouses are a compatible form of development with the surrounding area – “townhouses are residential, they create a residential street wall along Georgia Avenue and reinforce its residential character, and they act as a buffer between adverse impacts of a major highway and single-family homes.” Exhibit 38, p. 10. The Planning Board also found that the application is compatible with the surrounding area. Exhibit 40, p. 2.

Staff noted that a landscape buffer or fence will be provided, per a binding element, to buffer the townhouses to the north, and there is pedestrian circulation through the site that accommodates the walking patterns and needs of neighbors in the area. It should be added that Applicant also

committed, in Binding Element #1, to brick fronts and sides that face public rights-of-way to aide in compatibility with nearby townhouses. As discussed at length in Part III. J. of this report, the Applicant has also gone a long way towards alleviating other concerns raised by the community.

Based on this record, the Hearing Examiner agrees with the findings made by the Planning Board and Technical Staff that the proposed reclassification to the R-T 12.5 Zone and the proposed development would be compatible with development in the surrounding area.

C. Public Interest

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”
[Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment. The Master Plan and the recommendations of the Planning Board and Technical Staff were considered in Part III.G., and Parts V. A. and B., of this report. The Master Plan does not specifically recommend the zoning change sought by Applicant, but the requested rezoning is consistent with its objectives and general language. The Planning Board and its Technical Staff support the proposed rezoning, believing that the development will be compatible with surrounding uses and compliant with the purposes and standards of the R-T 12.5 Zone.

The impact on public facilities was discussed in Part. III. H. of this report. The evidence indicates that, although the local elementary school experiences some overcrowding, another

elementary school will be opening to serve the Albert Einstein cluster in the same general time frame that the proposed development would be completed. Moreover, “[t]he current Growth Policy schools test finds capacity adequate in the Albert Einstein (DCC) cluster.” *See* December 11, 2006 letter from Bruce H. Crispell, the Director of Long-range Planning for the Montgomery County Public Schools (attached to the Technical Staff report, Exhibit 38). Given Mr. Crispell’s conclusion and the plan for added capacity for elementary school students, the Hearing Examiner finds that there is sufficient school capacity for the proposed development.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and will clearly meet LATR standards. In fact, the amount of traffic produced would be less than is currently generated by the school use on the site. No evidence was presented to suggest that the proposed development would have any adverse effect on utilities or other public services. Community concerns about past sewage backups were discussed in Part III. J. of this report. The evidence is that the proposed development will not worsen any existing sewage backup problem, and by adding greater capacity for stormwater drainage, may actually improve any flooding problems previously experienced by the neighbors.

The potential for any adverse environmental impact was discussed in Part III. I. of this report. As noted there, the site is not in a special protection area; there are no known rare, threatened or endangered species on the property; and there are no specimen or champion trees on site. A stormwater management concept plan has been approved by DPS, and a preliminary forest conservation plan has been approved by the Planning Board. A forest conservation easement will be established on the western side of the site, which contains some wetlands, and Applicant will provide afforestation in the area. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment, nor is there any other such evidence of record.

For all of these reasons, as more fully discussed in Parts III. H., I., and J. of this report, the

Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The application has satisfied the requirements of the R-T 12.5 Zone and its Purpose Clause;
2. The application proposes a form of development that would be compatible with land uses in the surrounding area; and
3. The requested reclassification to the R-T 12.5 Zone has been shown to be in the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-858, requesting reclassification from the R-60 Zone to the R-T 12.5 Zone of 2.53 acres (110,315 square feet) of land known as Lots 1 - 9, Block C, Lot 18, Block H-H, and portions of adjacent rights-of-way to be abandoned by the State and County, and located at 10500 Georgia Avenue in Silver Spring, on the site of the Montgomery College of Art and Design, in the Carroll Knolls Subdivision of Silver Spring, be **approved** in the amount requested and subject to the specifications and requirements of the revised Schematic Development Plan, Ex. 60(d); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

I further recommend that the Council's resolution contain a notation that, by rezoning the property, it is not passing upon the question of whether the site is appropriate to be designated as Legacy Open Space. That question will be addressed in the first instance by Legacy Open Space Program officials, as well as the Planning Board and its Technical Staff, after due consideration of the pending request by some community residents that it be so considered.

Dated: July 11, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner